United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1909.

No 2010. 589

HENRY B. F. MACFARLAND, HENRY L. WEST, AND SPENCER COSBY, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, APPELLANTS,

vs.

CHRISTIAN F. UMHAU.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED APRIL 21, 1909.

C. J.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1909.

No 2010.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND SPENCER COSBY, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, APPELLANTS,

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 23, 1909.

In the Court of Appeals of the District of Columbia.

No. 2010.

HENRY B. F. MACFARLAND ET AL., Appellants,
vs.
CHRISTIAN F. UMHAU.

a Supreme Court of the District of Columbia.

Equity. No. 28362.

CHRISTIAN F. UMHAU, Complainant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and SPENCER COSBY, Commissioners of the District of Columbia, and THE DISTRICT OF COLUMBIA, a Municipal Corporation, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Original Bill.*

Filed March 8, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28362.

CHRISTIAN F. UMHAU, Complainant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and SPENCER COSBY, Commissioners of the District of Columbia, and THE DISTRICT OF COLUMBIA, a Municipal Corporation, Defendants.

To the Supreme Court of the District of Columbia:

The complainant, Christian Umhau, brings this his bill of complaint against the above-named defendants, and thereupon he avers and shows:

1. Complainant is a citizen of the United States, commorant in in the District of Columbia, and brings this suit in his own right.

2. Defendants, Henry B. F. Macfarland, Henry L. West and Spencer Cosby, are citizens of the United States, and are Commissioners of the District of Columbia, and sued as such.

3. Defendant, the District of Columbia, is a municipal corporation created by an act of the Congress of the United States, and is sued as such.

2 4. By deed dated the 28th day of May, 1896, this complainant became the owner in fee simple of lots numbered one hundred and forty-two (142) and one hundred and forty-three (143), Wright and Dole's subdivision of certain lands in said District, as said subdivision is of record in the office of the Surveyor of said District, said lots being also now known as lots numbered one hundred and forty-one (141) and one hundred and forty-two (142) in square numbered twenty-eight hundred and eighty-two (2882) on the books of assessment and taxation in the office of the Surveyor of said District, and by such latter numbering are advertised for sale as hereinafter shown.

5. By an act of the Congress of the United States, approved on the third day of March, 1899, entitled, "An act for the extension of Pennsylvania avenue, southeast, and for other purposes," it was, *inter alia,* provided:

"SEC. 5. That within ninety days after the approval of this act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a District Court, a proceeding to condemn the lands necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet.

"That of the amount found due and awarded for damages for and in respect of the land condemned under this act for the extension and widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines on the east and west sides of Sherman avenue as widened and extended: Provided, That no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

3 6. Under and in accordance with this act the Commissioners of said District, on or about the 31st day of May, 1899, filed a petition in this honorable court, holding a District court, in a certain cause numbered 555 on the dockets of said District court, asking that a jury of seven disinterested, judicious men be summoned—

"to assess the damages, if any, which each owner of land through which Sherman avenue is proposed to be extended and widened, as

aforesaid, may sustain by reason thereof, and that such other and further orders may be made and proceedings had as are contemplated by said act of Congress and by chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, to the end that a permanent right of way for the public over the said lands may be obtained and secured for the aforesaid extension and widening of Sherman avenue."

In accordance with the prayer of said petition a jury of seven men was subsequently summoned and thereafter other proceedings were had and taken in said cause numbered 555, which resulted in their filing in said cause a return or verdict, in the following words, and figures, to-wit:

"In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re THE EXTENSION AND WIDENING OF SHERMAN AVENUE.

"We, the jury in the above-entitled cause, hereby find the following verdict and award of damages for and in respect of the land condemned and taken necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet, as shown on the plat or map filed with petition herewith, as set forth in Schedule One, hereto annexed as a part hereof.

"And we, the jury aforesaid, in accordance with the act of Congress approved March 3d, 1899, for the extension and widening of said avenue, do hereby assess the sum of $77,293.50, being one-half of the damages, as aforesaid, as awarded in Schedule One hereto annexed, against those pieces or parcels of ground abutting on both sides of Sherman avenue and the extension thereof, as provided by said act, to a distance of three hundred feet from the building lines on the east and west sides of said Sherman avenue as widened and extended, which we find will be benefited by the
4 widening and extension of said avenue, as set forth in Schedule Two, which is hereto annexed and made a part hereof."

7. The said jury in their said verdict arbitrarily apportioned against this complainant's said lot numbered one hundred and forty-two (142) the sum of four hundred and fifty (450) dollars and against said lot numbered one hundred and forty-three (143) the sum of four hundred and thirty (430) dollars of the total award of damages of $77,293.50, so as aforesaid made by them.

The said award was apportioned among other lots abutting upon Sherman avenue and within three hundred feet thereof in sums varying from one-half a cent to about seventy-five cents per square foot.

8. That the said assessment of four hundred and fifty (450) dollars and four hundred and thirty (430) dollars apportioned against said lots numbered one hundred and forty-two (142) and one hundred and forty-three (143), respectively, is greatly in excess of any

benefit accruing to said lots by reason of said extension and widening of said Sherman avenue in accordance with said act of Congress, or any benefit that can possibly accrue hereafter to said lots. Instead of being enhanced in value since and by the said widening and extension, this complainant shows that the trend of prices for property abutting on said Sherman avenue, as so widened, have been uniformly downward and sales made within the past five years have been at prices much less than the same lots were estimated as being worth by the said jury of seven. And this complainant charges that the said prices so fixed were deemed fair and reasonable by the said Commissioners and were voluntarily paid by them without objection to the several property owners in whose favor awards of damages were made in and by said verdict.

9. Your complainant further charges and avers that said jury of seven in and by their said verdict did not undertake to assess benefits upon the lots abutting on both sides of said avenue, and the extension thereof, to a depth of three hundred feet, to the extent that said lots might be benefited by the proposed widening and extension of said avenue, but only apportioned amongst the lots within said prescribed area, which they found would be benefited, one-half of the amount found due and awarded for damages for and in respect of the land condemned for the extension and widening of said avenue. Nor did said jury in and by their said verdict find that the lots so assessed would be benefited in an amount equal to the sums severally assessed against said lots, said verdict reciting that the total sum was assessed against the pieces or parcels of ground which they found "will be benefited," and without finding, or attempting to find, actual benefits.

10. That on the incoming of said verdict, many owners of the lands affected thereby indicated their dissatisfaction therewith by exceptions filed in the cause, mainly because said assessments were unreasonable, excessive, exorbitant, unjust and grossly in excess of any possible benefits likely to accrue to said lands, or any of them, by reason of said proposed widening and extension. The effect of said exceptions, as this complainant is advised, was to oust the said court of all jurisdiction to proceed further with the cause, except to order the summoning of a jury of twelve, as provided by Section 263 of the Revised Statutes of the District of Columbia, of the following purport and effect:

"SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury."

Complainant is advised and informed that said property owners, so as aforesaid indicating dissatisfaction with said verdict, insisted on their said exceptions, and "no arrangement" to the contrary was

agreed upon between them and the said Commissioners. This complainant filed no exceptions to said verdict at the time, but he was advised that it was not necessary for him to do so because under said act of March 3, 1899, the extension and widening of said avenue were to be made only on condition that at least one-half of the amount found due and awarded as damages was assessed against the lands in said prescribed area, and if the exceptions of any one or more of said property owners were sustained, it would have had the effect of destroying the equation between the amount of damages awarded and the apportionment thereof by said verdict.

11. Although, as this complainant is advised, the effect of the filing of the exceptions to the verdict of said jury of seven was
7 to oust the said District court of further jurisdiction in the matter, except to order the summoning of a jury of twelve, the said court overruled all of the exceptions filed to said verdict, and on the 2nd day of October, 1901, passed an order "in all respects finally ratifying and confirming said verdict."

From this order said property owners, so as aforesaid filing exceptions to said verdict, took an appeal to the Court of Appeals of the District of Columbia, which said court, on, to-wit, April 1, 1902, reversed the said order of confirmation and remanded said cause to said District court with directions, *inter alia,* as follows: "And it is further ordered that said cause be, and the same is hereby, remanded to the Supreme Court of the District of Columbia that proceedings may be taken and a jury of twelve ordered as directed by the statute."

This complainant is advised that the effect of said order of reversal was to make it mandatory, in the event that the said Commissioners desired to proceed with said condemnation proceedings, that a jury of twelve be summoned as required by the provisions of said Section 263.

12. After the decision of the Court of Appeals as aforesaid, the said Commissioners took no action whatever looking to the summoning of a jury of twelve, or any other action in said condemnation proceedings. But in the year 1906, the said Commissioners advocated and procured the passage of an act of Congress, approved June 29, 1906, entitled, "An act to provide for the reassessment of benefits in the matter of the extension and widening of Sherman avenue, in the District of Columbia, and for other purposes"
8 whereby they were authorized and directed to make application to the court for the reassessment of benefits (although no assessment for benefits, as hereinbefore shown, had ever been made), under and in accordance with the act of Congress approved June 6, 1900, entitled, "An act for the extension of Columbia road east of thirteenth stre-t, and for other purposes." Said act provides in Section 2:

"SEC. 2. That of the amount found to be due and awarded as damages for and in respect of the land condemned for the extension of Columbia road as herein provided, such amount thereof shall be assessed by the jury hereinafter provided as benefits, and to the ex-

tent of such benefits, against those pieces or parcels of land on each side of said Columbia road as extended through block twenty-three of Columbia Heights, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road as said jury may find said pieces or parcels of land will be benefited."

And your complainant shows to the court that pursuant to said act of June 29, 1906, the said Commissioners are now proceeding in said condemnation cause numbered 555, for the purpose of securing such reassessment for benefits.

13. Your complainant is advised and therefore avers that no lawful reassessment for benefits can be made or had against his said property under the said act of June 29, 1906, because there has been no original or other assessment for benefits against said property; the said verdict of the jury of seven having reference only to an apportionment of at least one-half of the amount awarded as damages in respect of the land condemned, as hereinbefore shown, said apportionment being made without any regard whatever to benefits actually conferred.

9 14. Your complainant is further advised and therefore avers that it would be in the highest degree inequitable, unjust and unfair to burden his said property with said assessments of four hundred and fifty (450) dollars and four hundred and thirty (430) dollars, respectively, as hereinbefore shown, without any regard whatever to benefits actually conferred, and to exact of such of the owners of property affected as filed exceptions to the verdict of said jury an assessment only for benefits actually conferred, if any, by the extension and widening of said avenue.

15. Your complainant is further advised and therefore avers that said act of March 3, 1899, is unconstitutional and void for that it seeks to impose on the owners of land within the said prescribed area the burden of at least one-half of the cost of land condemned for the purpose of extending and widening the said avenue, without any regard whatever to benefits that may result from such extension and widening.

16. Your complainant is also advised and therefore avers that it would be exceedingly inequitable and unfair to require him and other owners of land within said prescribed area to pay at least one-half of the cost of the land taken for the widening of said Sherman avenue to a width of one hundred feet, because there existed no need or necessity for a street of that width in that section of the District. The said avenue as so widened was not intended as a route for street-car tracks or any other purpose other than for the usual and customary uses of a street.

On the same day, to-wit, March 3, 1899, at the instance
10 and solicitation of said Commissioners, Congress passed an act for the extension of a new street, to-wit, 11th street, West, intended as a route for a double line of street-car tracks, the width of which street was but ninety feet. Said street of said width has since been opened and accommodates two lines of car tracks and is amply sufficient for the purposes of street-car traffic and all other purposes of a street or highway in that section of the District.

On the passage of said act for the extension of said 11th street, it became and was entirely unnecessary to widen said Sherman avenue and subject the owners of said lands abutting thereon to the cost of land needed for said widening.

17. Your complainant is informed and therefore avers that after the verdict of said jury of seven was so as aforesaid ratified and confirmed by the court by the order of October 2, 1901, a copy of said verdict was certified to the Assessor of the District of Columbia; and thereupon said assessments and all of them so made by the said jury of seven were entered upon the books of said Assessor as a tax, and have ever since been so carried, notwithstanding, as before shown said order of confirmation was vacated and set aside by the said Court of Appeals.

The said Commissioners, acting through the taxing officials of said District, retained said assessments as a tax even after the order confirming the verdict of said jury was set aside as aforesaid; and would not issue a tax certificate showing that said property
11 was free of taxes even though all other tax assessments had been paid; or admit to record any proposed subdivision of said property, unless said assessments were first paid. In this way the said Commissioners have exacted from owners of said lots payment of said assessments and without such payment said lots could not be subdivided or sold free of taxes.

18. The said act of March 3, 1899, in the 12th section thereof, provides that said assessment should not be operative as a tax until confirmed by the court; and, as hereinbefore shown, said assessments have not been so confirmed except by said order of October 2, 1901, which said order was vacated and set aside by the said Court of Appeals.

19. Recognizing that said assessments were not collectible as a tax, without being confirmed by the court, and manifestly being advised that the court would have no jurisdiction, because of said aforementioned equation, to confirm the said verdict in part without further and enabling legislation, said Commissioners procured to be incorporated in the said act of June 29, 1906, a provisions authorizing the supreme court of the District of Columbia, holding a District Court, to—

"finally ratify and confirm the verdict, award and assessment of the jury found and returned in cause numbered 555 in said court, in the matter of the extension and widening of Sherman avenue from Florida avenue to Whitney avenue in the District of Columbia, as to all those pieces or parcels of land with respect to which no objection has been filed to said confirmation, and to condemn the land necessary for the said widening and extension of said Sherman avenue."

Complainant is advised and therefore avers that since the passage of said last-mentioned act no order has been passed in said
12 cause ratifying and confirming the said verdict, award and assessment as so authorized, or condemning the land taken for said widening and extension.

20. Although the said verdict of the jury has not been ratified and

confirmed by any final order of the Supreme Court of the District of Columbia, holding a District court, and notwithstanding the matters and things hereinbefore set forth, and alleged, said Commissioners have advertised the complainant's said property for sale because of the alleged non-payment of said assessments at a public sale to commence on the 9th day of March, 1909, and to continue from day to day thereafter until said property and other properties now being advertised for sale for non-payment of taxes have been sold.

21. The advertisement of complainant's said property appears on page 319 of a printed pamphlet published by said Commissioners entitled, "District of Columbia Real Estate Tax Sale," for 1908, and is as follows:

"Square No. 2882.

Umhau, Christian.
Lot 142.

Assessment for extension of Sherman avenue...	$450.00
Interest from December 2, 1901.....	130.85
Advertisement	.50
	581.35"

Umhau, Christian.
Lot 143.

Assessment for extension of Sherman avenue...	430.00
Interest from December 2, 1901.....	125.03
Advertisement	.50
	555.53"

22. The said alleged assessments as the same have appeared and now appear on the tax records of defendant corporation, as
13 aforesaid, cast a cloud upon the title of this complainant to said property so sought to be assessed and has prevented him from selling said property or otherwise dealing with it. The said advertisement further and seriously clouds the title of complainant to said property and should the same be sold complainant's title would be still further complicated by the intervention of third persons claiming under said sale and purchase thereat.

23. The invalidity of said assessment does not appear upon the face of said tax records, but depends upon judicial investigation and decision, whereas a deed given a purchaser of said property at such tax sale would under the statutes in such case made and provided be prima facie evidence in favor of the grantee therein named of the regularity and legality of all antecedent proceedings in connection with said assessment of said property.

Wherefore, your complainant being without remedy in the premises save in this honorable court where such matters are properly cognizable,

Prays:

1. That Henry B. F. Macfarland, Henry L. West and Spencer Cosby, as Commissioners as aforesaid, and the District of Columbia,

a municipal corporation, as aforesaid, may be made parties defendant to this bill, and duly served with process requiring them, and each of them, to be and appear in this court in person or by counsel, by some certain day to be in said process named, to answer the foregoing bill of complaint, and abide by and perform such decree as may be passed herein.

14 2. That the defendant corporation, the District of Columbia, its said Commissioners, and their agents and servants, may be temporarily and perpetually enjoined and restrained from selling said lots numbered one hundred and forty-two (142) and one hundred and forty-three (143) in Wright and Dole's subdivision, the property of this complainant, under the advertisement in said bill mentioned and described.

3. That said assessments of four hundred and fifty (450) dollars and four hundred and thirty (430) dollars, respectively, against said lots numbered one hundred and forty-two (142) and one hundred and forty-three (143) in Wright and Dole's subdivision, be vacated, set aside and for nothing held.

4. That said defendants be decreed to cancel said assessments on the tax records of defendant corporation in their custody, and perpetually enjoined from referring thereto in any tax certificate to be hereafter issued by them in respect of said lots.

And for such other and further relief as the nature of the case may require and to the court may seem fit.

And complainant will ever pray &c.

CHRISTIAN F. UMHAU.

MADDOX AND GATLEY,
Attorneys for Complainant.

The defendants to this bill are:

Henry B. F. Macfarland, Henry L. West and Spencer Cosby, Commissioners of the District of Columbia, and the District of Columbia, a municipal corporation.

15 DISTRICT OF COLUMBIA, *ss:*

Before me, the undersigned, a notary public in and for the District aforesaid, personally appeared Christian Umhau, who, being first duly sworn, deposes and says: I have read over the foregoing bill of complaint by me subscribed and know the contents thereof; the matters and things therein stated as of my personal knowledge are true; and those stated on information and belief I believe to be true.

CHRISTIAN F. UMHAU.

Subscribed and sworn to before me this 8 day of March, A. D. 1909.

[SEAL.]

J. WM. REILY
Notary Public, D. C.

16 *Restraining Order.*

Issued March 8, 1909.

In the Supreme Court of the District of Columbia.

No. 28362.

CHRISTIAN F. UMHAU, Complainant,
against
HENRY B. F. MACFARLAND ET AL., Defendants.

Upon the Complainant filing undertaking without surety as required by Equity Rule 42.

The Defendants are hereby restrained as prayed in the within-mentioned bill, until further order, to be made, if at all, after a hearing, which is fixed for the 12th day of March, 1909, of which take notice.

By the Court:

JOB BARNARD, *Justice.*

Marshal's Return.

Summoned defendant, The District of Columbia, a Municipal Corporation, and also served it with copy of within restraining order, by service on Major Spencer Crosby a member of the Board of Commissioners of defendant, March 8, 1909.

AULICK PALMER, *Marshal.*
S.

17 *Injunction Undertaking.*

Filed March 8, 1909.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 28362.

CHRISTIAN F. UMHAU, Complainant,
v.
THE DISTRICT OF COLUMBIA, Defendant.

Christian F. Umhau, the Complainant, and —— ——, sureties, hereby undertake to make good to the defendant all damages by him suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above-entitled cause, and stipulate that the damages may be ascertained in such manner as the justice shall direct, and that, on dissolving the injunction, he may give

judgment thereon against the principal and sureties for said damages in the cause itself dissolving the injunction.

CHRISTIAN F. UMHAU.

Approved March 8, 1909.
JOB BARNARD, *Justice.*

18 *Answer of Defendants.*

Filed March 12, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28362.

CHRISTIAN F. UMHAU
v.
HENRY B. F. MACFARLAND, HENRY L. WEST, and SPENCER COSBY, Commissioners of the District of Columbia, and THE DISTRICT OF COLUMBIA, a Municipal Corporation.

The answer of the defendants, Henry B. F. Macfarland, Henry L. West, and Spencer Cosby, Commissioners of the District of Columbia, and the District of Columbia, a municipal corporation, to the bill of complaint filed in this case, respectfully shows to the court:

1, 2 & 3. These defendants admit the allegations of the first, second and third paragraphs of said bill.

4. These defendants admit the allegations of the fourth paragraph of said bill.

5. Answering the fifth paragraph of said bill these defendants say that they admit the passage of the act of Congress approved March 3, 1899, but for greater certainty as to its provisions refer to the statute itself. They also say that the said statute provided, by section 11 thereof, as follows, viz:

> The sums to be assessed against each lot and piece and parcel of ground shall be determined and designated by the jury; and
19 in determining what amount shall be assessed against any particular piece or parcel of ground the jury shall take into consideration the situation of said lots and the benefits that they may receive from the extension of said avenue and highway.

6. The defendants admit that the then Commissioners of the District of Columbia filed said petition, which is partly described in paragraph 6 of said bill, on May 31, 1899, and they say that after the filing of said petition, by due proceedings and due process of law, the jury of seven men mentioned did duly file their return and verdict, which is in part set out in said paragraph.

7. Answering the 7th paragraph of said bill these defendants say, on their official information, that the said jury did not, in their said verdict, arbitrarily apportion the said sums for benefits alleged in said paragraph, but found that the complainant's property, after

taking evidence and viewing the said property, was benefited by the widening and extension of said avenue, as set forth in said Schedule 2, and they say that the said verdict also awarded the complainant the sum of Four Hundred and Ninety Dollars ($490) as damages for the taking of his land; as to said lot 142; the sum of Four Hundred and Ninety Dollars ($490) and as to said lot 143 the sum of Four Hundred and Sixty-Eight Dollars ($468). That the complainant demanded the payment of the said last named sums of the defendant the District of Columbia, and the same were paid to him and received by him on, to-wit, February 28, 1902, on the following voucher and check:

20 District of Columbia to Christian F. Umhau.

For amount of award of damages to lots 142 and 143, in Wright and Dole's Subdivision of part of Mt. Pleasant, in widening, etc. of Sherman Avenue, $958.

Received of C. C. Rodgers, Disbursing Officer, D. C., Check No. 129452, for $958, in full payment of the foregoing account.

CHRISTIAN F. UMHAU,
1714 *Seventh St. N. W.*

These defendants are advised and aver that by making said demand and receiving the said damages the said Umhau acquiesced in the said assessment of benefits now complained of, and never has heretofore made any objection thereto; that by the receipt of the said damages he waived any right to object to the assessment against the said lots for the said benefits; and that in equity and justice he should now pay the same, together with all costs and expenses of advertising the said property for the nonpayment thereof. The defendants further answering say that all the benefits against the several parcels of property involved in the proceeding were apportioned against the said properties respectively, according as they were actually benefited by the widening and extension of said avenue, as set forth in said Schedule 2.

8. Answering the eighth paragraph of said bill, these defendants deny that the said assessment of benefits set forth in said paragraph ever was greatly in excess of any benefit accruing to said lots, or any benefit that could accrue to said lots. On the contrary, these defendants are officially informed that the jury, after con-

21 sidering the evidence and viewing said property, found as a fact that the same was actually benefited, as hereinbefore set forth, and they further say that they have never heard, before the filing of this bill, that the complainant had ever contended before that said lots were not actually benefited in the amounts awarded as benefits against them by the said jury. These defendants are not advised whether the prices for the last five years have been less than the same lots were estimated as being worth by the said jury of seven, and as no facts are alleged in the bill to show what the prices were within the last five years, they cannot admit

that the prices for the said lots have been much less than they were estimated as being worth by the said jury of seven.

The said verdict was filed on May 9, 1900, and finally confirmed on October 2, 1901, and they therefore say that it is not important what the prices of real estate may have been within the past five years, in view of the fact that the prices of the said land for four years immediately preceding said five years are not set forth and are not charged to have been greater than the value of the land as fixed by the said jury, and they further say that nothing is shown in the bill as to what value the jury in fact placed upon the complainant's land. The defendants admit that the damages fixed by the jury were paid to the complainant and to other property owners, but they say said payments were made in each case on demand of the complainant and the other property owners, and that the said complainant and the said other property owners thereby waived
22 any right to object to the benefits assessed against their several properties.

9. These defendants deny the allegations of the ninth paragraph of said bill, and they say that the verdict and return of the said jury on its face contradicts, so they are advised, the allegations of the said paragraph. They are advised that the said verdict discloses on its face that the assessment for benefits was made for actual benefits which were found by the jury and therefore assessed against the said several pieces of property, and that the said verdict means that the lots so assessed would be benefited in an amount equal to the sums severally assessed against the same. They are also advised that it was just and lawful for the jury to have found that the several pieces of property "will be benefited."

10. Answering the tenth paragraph of said bill, as to the expression of dissatisfaction of some of the owners of said lands affected by the assessment of benefits, they refer to the proceedings in said District Court case for the reasons given by said owners in their several exceptions. They are advised, and therefore deny, that the jurisdiction of the court to proceed further with the said cause was ousted by the filing of said exceptions, and they are advised, and therefore aver, that the confirmation of the said verdict, on October 2, 1901, as to the complainant, without any appeal taken from the order of confirmation by him, became, was and is final and absolute as against him. These defendants deny all the conclusions of law set forth in the said paragraph.

23 11. These defendants deny the conclusions of law set out in the eleventh paragraph of said bill, and they say that, as to the property owners who appealed from the said order of confirmation, the said owners were persons who had filed exceptions to the verdict and award before its confirmation, and that said appeal was heard on the said exceptions, and that the said order of confirmation was reversed only as to the said owners who had filed the said exceptions and taken the said appeal, and they are advised that the Court of Appeals has recently held that as to the owners who failed to file exceptions to a like verdict the order of confirmation was final and binding.

12. Answering the twelfth paragraph of said bill these defendants say that they are now proceeding in the said District Court case as against those owners of property who had excepted to the award of the said jury before its confirmation, and that they are not proceeding as against the complainant or his said property in said cause.

13. These defendants are advised that the matters contained in the thirteenth paragraph of said bill are matters of law which do not require an answer, but they do not admit the legal conclusions therein set forth.

14. Answering the fourteenth paragraph of said bill the defendants deny that the assessment of benefits against said property is inequitable, unjust and unfair, and they deny the legal conclusions by virtue of which said allegation is made in said paragraph.

15. These defendants are advised that the allegations of the fifteenth paragraph are purely allegations of matters of law,
24 and that it is not necessary that they should answer the same. They are, however, advised that the said matters of law contended for by complainant are erroneous, and they are also advised that the said act of March 3, 1899, is constitutional.

16. Answering the sixteenth paragraph of said bill the defendants say that the Congress of the United States, by its said act, required the extension and widening of said Sherman Avenue, and fixed the assessment area thereof, and they are advised that the said Legislature having so acted it is not within the province of the complainant to dispute the validity of the said law.

17. The defendants admit that after the said verdict was ratified and confirmed a copy thereof was certified to the Assessor, and that thereupon said assessments were entered on the books of the Assessor as a tax, and have been so carried on said books. These defendants are not advised by the said bill as to the particular cases wherein they declined to issue tax certificates showing that the said property was free of taxes, but they do not see how they could, in the discharge of their official duty, have issued such certificates, in view of the fact that the assessment on the complainant's property for said benefits still remains, as they understand it, a valid, lawful assessment. They are not advised of the particular instances wherein any proposed subdivision of said property was not allowed unless said assessments were first paid, but in the discharge of their official duty they believe that they were required to refuse admission
25 of any such subdivisions to record. They say, however, that their refusal to admit subdivisions of record did not deprive the property owner of his right to build on his said property as he might choose, and they are advised, and therefore aver, that they had the sole right of determining whether they shall or shall not admit any subdivision of record. They deny that they exacted payment of any of said assessments because of any refusal to give tax certificates, or to allow the record of any subdivision, and they say that they never have attempted to coerce the owners of property other than by lawful means and as required by law.

18. And they deny the conclusions of law set forth in the eighteenth paragraph of said bill.

19. They admit the passage of the act of June 29, 1906, and refer to the said statute for a correct statement of the provisions thereof. They deny the conclusions of law and the deductions of complainant as to the legal consequences of the passage of the said act. They admit that since the passage of said Act no order has been passed in said cause ratifying and confirming said award and assessment, but they say that the land has been condemned, taken & paid for by the District of Columbia as shown by the aforesaid receipt of this complainant the owner.

That the 3rd prayer in the supplemental petition filed in District Court case No. 555 prays for an order under this act.

20. They say that the verdict of said jury has been ratified and confirmed by an official order of the said Court as herein-
26 before set out, and in accordance therewith, and with the provisions of law in such case made and provided, the said property has been advertised for sale, as set forth in said paragraph.

21. They admit the allegations of the twenty-first paragraph of said bill.

22. They deny that the said assessments cast a cloud upon the title of the complainant.

23. Answering the twenty-third paragraph of said bill they say that if the said assessment be invalid, which they deny, the invalidity thereof does appear upon the face of the tax records, and they deny the conclusions of law set forth in the said twenty-third paragraph.

These defendants further answering say that by reason of the lapse of time since the return of said verdict and the assessment of said benefits and the receipt of the said damages by the complainant, the said complainant has lost any right to complain of the invalidity of the said assessment; that it was the duty of the said property owner, if he objected to the said assessment, to refrain from delaying until his said property was advertised for sale, and to promptly take steps to contest the regularity and validity of the said assessment.

They are further advised that, under the circumstances of this case, in order to entitle the complainant to equitable relief, it is his duty to pay the amount of said tax either into the registry of the court or to the District of Columbia; and that the complainant is not entitled to an injunction on the ground that the said as-
27 sessment of benefits is unconstitutional. And they, the defendants, pray the benefit of these objections, and of all other legal objections heretofore made, as though they had demurred to said bill.

HENRY B. F. MACFARLAND,
HENRY L. WEST,
SPENCER COSBY,
Commissioners, D. C.

E. H. THOMAS,
Attorney for Defendants.

DISTRICT OF COLUMBIA, *ss:*

Henry B. F. Macfarland, Henry L. West and Spencer Cosby being duly sworn respectively say that they have read the above answer by them subscribed and know the contents thereof; and they say that the matters and things therein stated on their official information are true, and the matters and things therein stated on information and belief, they believe to be true.

HENRY B. F. MACFARLAND.
HENRY L. WEST.
SPENCER COSBY.

Subscribed and sworn to before me this eleventh day of March, 1909.

WILLIAM TINDALL,
Notary Public, D. C.

[SEAL.]

28 *Exceptions to Answer of Defendants.*

Filed March 26, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28362.

CHRISTIAN F. UMHAU, Complainant,
vs.
HENRY B. F. MACFARLAND ET AL., Defendants.

First Exception. For that the said defendants have not in and by their said answer to the averments of paragraph numbered 12 of the bill of complaint, according to the best of their knowledge, remembrance, information and belief, answered and set forth whether or not they, the said defendants, subsequent to the 1st day of April, 1902, took any action or steps whatever looking to the summoning of a jury of twelve as required by the judgment of the Court of Appeals promulgated on said day.

Second Exception. For that said defendants have not in and by their said answer to the averments of paragraph numbered 18 of said bill, in manner aforesaid answered and set forth whether or not the assessments made by the verdict of the jury of seven filed in this Honorable Court, holding a District Court, in cause numbered 555, on the 9th day of May, 1900, have been ratified or confirmed by any order of Court subsequent to the order of the Court of Appeals of said District promulgated, as aforesaid, on, to-wit, the 1st day of April, 1902.

MADDOX & GATLEY,
Attorneys for Complainant.

29 *Order Continuing Injunction Until Final Hearing.*

Filed March 26, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28362.

CHRISTIAN F. UMHAU
vs.
DISTRICT OF COLUMBIA.

On the filing of the Bill in this cause the Court without notice to the defendants restrained them as prayed in the bill until further order to be made, if at all, after a hearing, which was fixed for the 12th day of March, 1909; that on said day this cause was heard as fixed by said order on the Bill and the answer of the defendants thereto and thereupon the Court continued the said injunction until the final hearing of this cause and it is now this 26th day of March, 1909, ordered, that the said injunction be and the same is hereby continued until the final hearing as heretofore determined by the Court.

JOB BARNARD, *Justice.*

From the above order the defendants jointly and severally in open Court appeal to the Court of Appeals.

JOB BARNARD, *Justice.*

30 *Directions to Clerk for Preparation of Transcript of Record.*

Filed March 26, 1909.

In the Supreme Court of the District of Columbia, the 26th Day of March, 1909.

Equity. No. 28362.

UMHAU
vs.
DISTRICT OF COLUMBIA.

The Clerk of said Court in making up the record on the appeal in this case will include—

1. The Bill.
2. The Answer.
3. Restraining Order.
4. Injunction Undertaking.

5. Order of Court continuing injunction, and appeal therefrom.
6. Exceptions to Answer.

E. H. THOMAS,
Attorneys for Def'ts.

March 26, 1909.

Service of copy acknowledged.
MADDOX & GATLEY.

31 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 30 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 28362 In Equity, wherein Christian F. Umhau is Complainant and Henry B. F. Macfarland, &c. *et al.,* are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 19th day of April A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 2010. Henry B. F. Macfarland *et al.,* appellants, *vs.* Christian F. Umhau. Court of Appeals, District of Columbia. Filed Apr. 21, 1909. Henry W. Hodges, clerk.

ADDITION TO RECORD PER STIPULATION OF COUNSEL.

Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No. 2010.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND SPENCER COSBY, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, APPELLANTS,

vs.

CHRISTIAN F. UMHAU.

FILED NOVEMBER 6, 1909.

Court of Appeals, District of Columbia, April Term, 1909.

No. 2010.

HENRY B. F. MACFARLAND and Others
vs.
CHRISTIAN F. UMHAU.

Stipulation.

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the following instruction or order be and the same is hereby made a part of the record on appeal in this cause, the same to be considered as having the same force and effect as though specifically set forth in the original bill of complaint and admitted in the answer to said bill.

Order.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

No. 555.

In re THE EXTENSION AND WIDENING OF SHERMAN AVENUE.

On consideration of the petition of the Commissioners of the District of Columbia, filed herein, and it appearing to the Court that the notice heretofore ordered herein, has been duly published, it is this 15th day of January, A. D. 1900, on motion of counsel for said Commissioners, Ordered: That the United States Marshal for the District of Columbia summon a jury of seven (7) judicious, disinterested men, not related to any party interested in this proceeding, to be and appear upon the premises described in the petition herein, on a day specified, to assess the damages, if any, which each owner of land may sustain by reason of the extension and widening of Sherman Avenue from Florida Avenue to Whitney Avenue with the uniform width of one hundred feet, as prayed in said petition. And of the amount found due and awarded as damages by said jury, for and in respect of the land condemned for the extension and widening of said Sherman Avenue, not less than one-half thereof shall be assessed by said jury against those pieces or parcels of ground abutting on both sides of Sherman Avenue, and the extension thereof, except, that no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman Avenue; and to further proceed in accordance with the Act of Congress approved March 3, 1899, entitled "An Act for the extension of Pennsylvania Avenue Southeast and for other purposes."

By the Court:

A. B. HAGNER,
Ass. Justice.

EDWARD H. THOMAS,
Corporation Counsel.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Att'ys for Appellee.

[Endorsed:] No. 2010. Henry B. F. Macfarland et al., appellants, vs. Christian F. Umhau. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Nov. 6, 1909. Henry W. Hodges, clerk.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1909.

No. 2010.

HENRY B. F. MACFARLAND ET AL., APPELLANTS,

vs.

CHRISTIAN F. UMHAU.

BRIEF FOR APPELLANTS.

EDWARD H. THOMAS,
Corporation Counsel, for Appellants.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1909.

No. 2010.

HENRY B. F. MACFARLAND ET AL., APPELLANTS,

vs.

CHRISTIAN F. UMHAU.

BRIEF FOR APPELLANTS.

Statement of the Case.

This case represents one of a series of ten cases involving like disputed legal questions. It was thought advisable to learn from this court as early as practicable what rules of law were applicable and thus to subserve both public and private interests by the prosecution of this appeal.

By an act of the Congress of the United States, approved on the third day of March, 1899, entitled, "An act for the extension of Pennsylvania avenue, southeast, and for other purposes," it was, *inter alia,* provided (30 St. at Large, 1380):

"SEC. 5. That within ninety days after the approval of this act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by

a petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the lands necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet.

"That of the amount found due and awarded for damages for and in respect of the land condemned under this act for the extension and widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines on the east and west sides of Sherman avenue as widened and extended: *Provided,* That no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

Section 11 of the statute provides:

"The sums to be assessed against each lot and piece and parcel of ground shall be determined and designated by the jury; and in determining what amount shall be assessed against any particular piece or parcel of ground the jury shall take into consideration the situation of said lots and the benefits that they may receive from the extension of said avenue and highway."

Within said ninety days the bill alleges (R., bottom of page 2) and the answer admits (R., bottom of page 11) the then Commissioners of the District of Columbia filed their petition under said section five of said act, asking that a jury of seven disinterested, judicious men be summoned—

"to assess the damages, if any, which each owner of land through which Sherman avenue is proposed to be extended and widened, as aforesaid, may sustain by reason thereof, and that such other and further orders may be made and proceedings had as are contemplated by said act of Congress and by chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, to the end that a permanent right of way for the public over the said lands may be obtained and secured for the aforesaid extension and widening of Sherman avenue."

In accordance with the prayer of said petition a jury of seven men was subsequently summoned and thereafter other proceedings were had and taken in said cause numbered 555, which resulted in their filing in said cause a return or verdict, in the following words, and figures, to-wit:

"In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re THE EXTENSION AND WIDENING OF SHERMAN AVENUE.

"We, the jury in the above-entitled cause, hereby find the following verdict and award of damages for and in respect of the land condemned and taken necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet, as shown on the plat or map filed with petition herewith, as set forth in Schedule One, hereto annexed as a part hereof.

"And we, the jury aforesaid, in accordance with the act of Congress approved March 3d, 1899, for the extension and widening of said avenue, do hereby assess the sum of $77,293.50, being one-half of the damages, as aforesaid, as awarded in Schedule One hereto annexed, against those pieces or parcels of ground abutting on both sides of Sherman avenue and the extension thereof, as provided by said act, to a distance of three hundred feet from the building lines on the east and west sides of said Sherman avenue as widened and extended, *which we find will be benefited by the widening and extension of said avenue,* as set forth in Schedule Two, which is hereto annexed and made a part hereof" (Bill, par. 6, R., pp. 2 and 3).

The answer states (par. 6, R., 11):

"6. The defendants admit that the then Commissioners of the District of Columbia filed said petition, which is partly described in paragraph 6 of said bill, on May 31, 1899, and they say that after the filing of said petition, by due proceedings and due process of law, the jury of seven men mentioned did duly file their return and verdict, which is in part set out in said paragraph."

The verdict mentioned was filed May 9, 1900, and was finally confirmed on October 2, 1901 (Ans., par. 8, R., top of page 13), without any exceptions having been filed by complainant to the verdict (Bill, R., top of page 5).

The bill in this case was filed seven years and five months after said confirmation, to wit, on March 8, 1909 (R., 1). The evidence which was adduced before the jury, and the instructions of the court, are not contained in the bill.

The first objection made by the bill is as follows (par. 7, R., 3):

"7. The said jury in their said verdict arbitrarily apportioned against this complainant's said lot numbered one hundred and forty-two (142) the sum of four hundred and fifty (450) dollars and against said lot numbered one hundred and forty-three (143) the sum of four hundred and thirty (430) dollars of the total award of damages of $77,293.50, so as aforesaid made by them.

"The said award was apportioned among other lots abutting upon Sherman avenue and within three hundred feet thereof in sums varying from one-half a cent to about seventy-five cents per square foot."

The answer to this paragraph of the bill states (R., 11):

"7. Answering the 7th paragraph of said bill these defendants say, on their official information, that the said jury did not, in their said verdict, arbitrarily apportion the said sums for benefits alleged in said paragraph, but found that the complainant's property, after taking evidence and viewing said property, was benefited by the widening and extension of said avenue, as set forth in said schedule 2."

The award of damages is set forth in the answer and the acceptance of said damages is averred to estop the complainant from attacking the validity of the assessment of benefits against his property.

The second objection, urged by the bill (par. 8, R., 3) is that the assessment for benefits is (not was) greatly in excess of benefit accruing to said lots by reason of said extension and widening of said Sherman avenue, or any benefit that

can possibly accrue hereafter to said lots. This allegation that the assessment was greatly in excess of any benefits as alleged, is denied by the answer. The answer sets forth that the jury found as a fact that the lots were actually benefited, and before the filing of the bill the defendants have never heard of such contention of the complainant (Ans., par. 8, R., 12).

The bill having alleged that the damages awarded were voluntarily paid complainant, the defendants reply that payment was made on demand of complainant.

The third objection is that the jury of seven, *"in and by their verdict,* did not undertake to assess benefits upon the lots abutting on both sides of said avenue, and the extension thereof, to a depth of three hundred feet, to the extent that said lots might be benefited by the proposed widening and extension of said avenue, but only apportioned amongst the lots within said prescribed area, which they found would be benefited, one-half of the amount found due and awarded for damages for and in respect of the land condemned for the extension and widening of said avenue. Nor did said jury in and by their said verdict find that the lots so assessed would be benefited in an amount equal to the sums severally assessed against said lots, said verdict reciting that the total sum was assessed against the pieces or parcels of ground which they found 'will be benefited,' and without finding, or attempting to find, actual benefits" (Bill, par. 9, R., 4).

The answer denies that such a construction should be placed on the wording of the verdict and award, and contends that its true construction shows that it discloses an assessment for actual benefits (R., 13). The verdict and award, it will be noted, substantially follows the language of section five of the act, and, in fact, states that the assessment is made *"as provided by said act."* It is true the verdict and award assessed the damages on property which the jury found "will be benefited," instead of the words "may receive," contained in section 11 of the act, but the meaning is the same.

The fourth objection (Bill, par. 10, R., 4) is, in effect, that other owners than the plaintiff indicated their dissatisfaction to the verdict and award by exceptions thereto. This fact is claimed to have ousted the court of jurisdiction, and it is also asserted that it was not necessary for the plaintiff to file exceptions because the act requires that the assessment shall be at least one-half of the amount found due and awarded as damages, and hence the allowance of some exceptions destroys the equation between the damages and their apportionment. The verdict of the jury, it will be observed, maintained the equation and the court confirmed the whole verdict on October 2, 1901 (Bill, par. 11, R., 5).

The fifth objection is, that this court, on April 1, 1902, reversed said order of confirmation on the appeal of certain property owners other than the plaintiff and remanded the cause with direction "that proceedings may be taken and a jury of twelve ordered as directed by the statute" (Bill, par. 11, R., 5). The mandate is not set out in the bill, and the answer says "that the said order of confirmation was reversed only as to said owners who had filed the said exceptions and taken the said appeal" (Ans., par. 11, R., 13).

There was no order made by the District court on the mandate, and it does not appear that the plaintiff took any action in said case asking that said order of confirmation be set aside or vacated. The sixth objection (Bill, pars. 12 and 19, R. S., 7) is that the act of Congress approved June 29, 1906, entitled "An act to provide for the reassessment of benefits in the matter of the extension and widening of Sherman avenue, in the District of Columbia, and for other purposes," which the plaintiff supposes rendered invalid the confirmation of the verdict as to him on October 2, 1901. The said act reads as follows:

"An Act to Provide for the Reassessment of Benefits in the Matter of the Extension and Widening of Sherman Avenue, in the District of Columbia, and for Other Purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Supreme Court of the District of Columbia, holding a United States district court, *is hereby authorized* to finally ratify and confirm the verdict, award, and assessment of the jury found and returned in cause numbered five hundred and fifty-five in said court in the matter of the extension and widening of Sherman avenue from Florida avenue to Whitney avenue, in the District of Columbia, as to all of those pieces or parcels of land with respect to which no objection has been filed to said confirmation, and to condemn the land necessary for the said widening and extension of said Sherman avenue; and in case any assessments for benefits against any piece or parcel of land mentioned in said verdict has been or may be vacated by reason of objections filed thereto, or for any other reason, the Commissioners of the District of Columbia *are hereby authorized and directed* to make application to said court for a reassessment of such benefits under and in accordance with the terms and provisions of the act of Congress approved June sixth, nineteen hundred, entitled "An act for the extension of Columbia road east of Thirteenth street and for other purposes;" and said assessments or benefits shall have priority over all deeds of trusts, mortgages, judgments and other liens."

The Commissioners by this act are not directed to make any application to the court to have another confirmation of the verdict and award as to those parcels of land with respect to which no objection had been filed, but they were directed thereby to make such application for reassessment of benefits which had been vacated by reason of objection or for any other reason.

The answer shows (par. 12, R., 14) that the Commissioners are now proceeding in the said District-court case against those owners of property who had excepted to said award before its confirmation, and that they are not proceeding against the plaintiff or his property.

The seventh objection is that the said act of March 3, 1899, is unconstitutional and void because it is alleged it seeks to impose on land owners within the prescribed area at least one-half of the cost of the land condemned without regard to benefits.

The bill avers (par. 17, R., 7) that after the confirmation of October 2, 1901, a copy of said verdict was certified to the assessor of the District of Columbia, and said assessments were entered as a tax. Section 12 of the act of March 3, 1899, provides:

"SEC. 12. That when confirmed by the court the assessments shall severally be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia, and shall be payable in five equal installments, with interest at the rate of four per centum per annum until paid. When the use of a part only of any piece or parcel of land shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof from the opening of said streets or highways, but such benefits shall be considered in determining what assessment shall be made on or against that part of such lot as is not taken, as hereinbefore provided."

The time of payment of this assessment was made certain and definite by the act of July 1, 1902 (32 Statutes, 616), which provides:

"*In all cases* where the assessments for benefits for street extensions *have been or may hereafter be levied,* payment of the same shall be made in five equal annual installments with interest at the rate of four per centum per annum *from and after sixty days after the confirmation of the verdict and award: Provided,* That the amount of any payment of any installment or installments heretofore made on account of any such assessment shall be credited thereon, and the balance shall be due and payable as if such assessment had been originally payable in the installments and with the interest as herein provided."

It will be noted that the act of July 1, 1902, applies to "all cases where assessments for street extensions *have been* or may hereafter be levied."

The effect of this curative act is to require the payment of interest from July 1, 1902 (Buchanan *v.* Macfarland, 31 App. D. C., 6-23). The assessment complained of having been confirmed on the 2d day of October, 1901, it became wholly due not later than five years and sixty days thereafter, with interest from July 1, 1902, and accordingly the property was advertised for sale, to commence March 9, 1909, with interest on the assessments from December 2, 1901 (Bill, pars. 20 and 21, R., 7, 8).

It was only after the property was advertised that the plaintiff commenced these collateral proceedings to restrain the collection of the assessments.

The answer says:

"These defendants further answering say that by reason of the lapse of time since the return of said verdict and the assessment of said benefits and the receipt of the said damages by the complainant, the said complainant has lost any right to complain of the invalidity of the said assessment; that it was the duty of the said property owner, if he objected to the said assessment, to refrain from delaying until his said property was advertised for sale, and to promptly take steps to contest the regularity and validity of the said assessment.

"They are further advised that, under the circumstances of this case, in order to entitle the complainant to equitable relief, it is his duty to pay the amount of said tax either into the registry of the court or to the District of Columbia" (Ans., par. 23, R., 15).

On the filing of the bill without notice to the defendants they were restrained from collecting these assessments and said injunction was continued until final hearing. From the decree so continuing said injunction the defendants have appealed to this court (R., 17).

Assignment of Errors.

1. The court erred in granting and continuing the injunction against the collection of the said assessments.

2. The court erred in not overruling the several objections of the plaintiff made by the bill and contained in the record.

3. The court erred in not dissolving said injunction and in not holding that the sale of said property as advertised was a legal and valid proceeding.

ARGUMENT.

I.

The first and second objections of the plaintiff, that the jury of seven arbitrarily apportioned the damages and that the verdict was in excess of actual benefits, ought not to be reviewed in this proceeding.

First, because no exception was filed by the plaintiff in the District court; second, because that court confirmed the verdict; and, third, because the lapse of time since said verdict was filed (May 9, 1900) is too great to obtain reliable evidence on the subject; and, lastly, because the District court was and is the proper tribunal to investigate said question.

Even had the point been made before the District court and a direct appeal taken from its adverse ruling, no review of this contention could have been secured.

No review of fact was intended by the act of March 3, 1899, for the extension and widening of Sherman avenue. In Brown *v.* Macfarland (a direct appeal) this court, in construing said act, said:

"The record contains no evidence of the actings and doings of the jury of seven other than that furnished by the verdict itself. *There was no evidence produced in the court below,* and of course there is none produced here. The matters of valuation and award of damages, nor that of assessments for benefits, cannot, therefore, be the subjects of review by this court. *The statute, manifestly, does not contemplate that such a review should be had by the court, as there is no provision made for the production of evidence to the court,* and it is expressly provided that the verdict of the second jury *shall be final and conclusive.*" (The last italics are in the opinion.)

Brown *v.* Macfarland, 19 App. D. C., at page 529.

But even if the right to review the evidence existed by statute that fact would not help the plaintiff.

"It is true that there are some things in the record before us which may be supposed to have a tendency to show that the jury was misled, or improperly influenced by an apparent threat of counsel for the Commissioners, into the adoption of an erroneous standard of assessment; and that arbitrarily and without justification they assumed to assess one-half of the award of damages as benefits against the adjacent property. But they were allowed by statute to assess that amount; and inasmuch as in other cases, where the acts of Congress themselves have arbitrarily undertaken to direct the assessment of such one-half (such acts) have been sustained by the Supreme Court of the United States as violating no right (Wight *v.* Davidson, 181 U. S., 371), we cannot assume to say that the jury adopted an illegal and erroneous standard in this case. It is a question of fact, upon which we cannot pass, and not a question of law, that, in the absence of the threat to which reference has been made, the jury might have adopted some different standard."

Clapp *v.* Macfarland, 20 App. D. C., 231.

There is no allegation that there was any fraud, corruption, or mistake by the jury of seven.

In Shoemaker *v.* United States, 147 U. S., 282, 305, it was said:

"In connection with this part of the subject, we may appropriately consider the objection made to the action of

the court below in declining to review and pass upon the evidence that had been produced before the Commissioners.

"If, as we have said, the court below was right in refusing to restrict the Commissioners to a mere consideration of the evidence adduced, then it would seem to follow that the court could not be legitimately asked, *in the absence of any exceptions based upon charges of fraud, corruption or plain mistake on the part of the appraisers,* to go into a consideration of the evidence. The court cannot bring into review before it the various sources and grounds of judgment upon which the appraisers have proceeded. The attempt to do so, would transfer the function of finding the values of the lands from the appraisers to the court. Such a course would have presented a much more serious allegation of error than we find in the objection as made."

Shoemaker *v.* United States, 147 U. S., 304-305.

Where an action was brought to foreclose a lien of an assessment levied upon certain real estate, and the defendant filed a cross-complaint (in the nature of a collateral attack), which alleged that the act of the legislature was unconstitutional, and also objected to the validity of the assessment, that the alleged improvement was of no benefit to the property, and that, on the contrary, the assessment upon such lots was greater than their value, and resulted in a substantial confiscation of the property; also that the assessment had been made by the front foot and without reference to the benefits received from the improvement, and that no hearing before the board of trustees was had, and no consideration given to the question of whether or not the abutting property or any part thereof was specially benefited in an amount equal to, less than, or in excess of the amounts fixed by the assessments which were confirmed by such board, but on the contrary that the assessments were made and confirmed upon the theory and belief that the statutes of the State established the rule of assessment at the same fixed price per lineal foot on each side for the whole improvement, and that no change could be made therein by the board of trustees, and that the board refused at such hear-

ings to hear or consider any objection to the assessment based upon any inquiry into the amount of special benefit accruing to any abutting lot or parcel of land, it was held that "the amount of benefits resulting from an improvement is a question of fact, and a hearing upon it being assumed the decision of the board is final."

Hibben *v.* Smith, 191 U. S., 310-321.

The order of confirmation cannot be attacked in a collateral proceeding by bill in equity.

Briscoe *v.* Macfarland, 32 App. D. C., 167.

The confirmation of a special assessment by the county court upon the report of the Commissioners is conclusive until reversed. It is *res adjudicata* and cannot be questioned.

Chicago and Western R. R. Co. *v.* People, 83 Ill., 467.

Where an assessment has been confirmed by the court and no appeal has been taken from that judgment, the question as to the legality of the assessment in a proceeding to collect the same must be regarded as *res adjudicata.*

Andrews *v.* People, 84 Ill., 29.

A valid judgment is binding upon the parties and upon the court and cannot be set aside at a subsequent term of the court except by the order of an appellate court.

People *v.* McCormick, 165 Ill., 222.

Errors and irregularities in assessments for street openings in the city of New York must be corrected and reviewed in the proceedings themselves; they cannot be urged by a collateral action in equity. An order confirming an assessment has the force and conclusiveness of a judgment.

Mayer *v.* Mayor, 101 N. Y., 284.

The Question of Laches.

A party seeking to have a judgment vacated must proceed with diligence and take the proper steps therefor within a reasonable time.

Societe Fonciere, etc., *v.* Milliken, 135 U. S., 304 (two years).

In re Peekamoose Fishing Club (Sup. Ct., App. Div.), 40 N. Y. Supp., 959 (eight months).

Altmann *v.* Gabriel, 28 Minn., 132 (eleven months).

Sanderson *v.* Dox, 6 Wis., 164 (one year).

Ammerman *v.* State, 98 Ind., 165 (seventeen months).

Smallworth *v.* Trenwith, 110 N. Car., 91 (three years).

School Dist. No. 63 *v.* Chicago Lumber Co., 41 Kans., 618 (four years).

Osborn *v.* Gehr, 29 Neb., 661 (five years).

"The judgment of condemnation in this case was rendered by a competent court, charged with a special statutory jurisdiction, and all the facts necessary to the exercise of this jurisdiction are shown to exist. A judgment thus obtained is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction.

"If it were so, railroad companies would have no assurance that the steps taken by them to procure the right of way would conclude any one, and they would be constantly subject to vexatious litigation."

Secombe *v.* R. R., 23 Wall., 108, 119.

"The District court possesses superior jurisdiction, within the meaning of the familiar rule that the judgments of courts of that character cannot be assailed collaterally, except upon grounds that impeach their jurisdiction. In Kempe's Lessee *v.* Kennedy, 5 Cranch, 173, 185, Chief Justice Marshal, after observing that the words 'inferior court' apply to courts of special and limited authority erected on such prin-

ciples that their proceedings must show jurisdiction, said: 'The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded.' In McCormick *v.* Sullivant, 10 Wheat., 192, 199, where the question was, whether a decree in a suit in the Federal District Court of Ohio, which did not show that the parties were citizens of different States was *coram non judice* and void, the court said that the reason assigned for holding that decree void 'proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities.' And in Galpin *v.* Page, 18 Wall., 350, 365, the court said: 'It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also.' The general rule that, unless the contrary appears from the record, a cause is deemed to be without jurisdiction of a circuit or district court of the United States—their jurisdiction being limited by the Constitution and acts of Congress—has no application where the judgments of such courts are attacked collaterally."

Cuddy Petitioners, 131 U. S., at pp. 284, 285.

The jury of seven was a special tribunal, under the record in this case, created for the purposes of awarding damages and ascertaining benefits. Of the findings of a special tribunal the Supreme Court has said:

"Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something

more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. Here the question determined by the State board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board. It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish fraudulent conduct on the part of the board sufficient to vitiate its determination."

Pittsburg, &c., Railway Co. *v.* Backus, 154 U. S., 421, 434, 435.

Adams Express Co. *v.* Ohio, 165 U. S., 194, 229.

Much more secure against collateral attack, in absence of fraud shown, it would seem, is the confirmation of the assessment made by the District court.

Fay *v.* District of Columbia, 37 W. L. R., 426.

As said in Briscoe *v.* Macfarland, 32 App. D. C., 170:

"There is nothing in the record" (of the assessment case) "to indicate that the amount assessed against the plaintiff's lot was actually in excess of benefits accruing from the extension of the avenue, so as to bring the case within the principle governing the later case of Martin *v.* District of Columbia, 205 U. S., 135."

The determination of the body charged with the duty of making an assessment of benefits and damages in a street improvement that a particular lot is benefited thereby is, when confirmed by the common council, final unless impeached for fraud (Wright *v.* Forrestal, 65 Wis., 341; 27 N. W., 52).

In no event, however, is the assessment non-enforceable except "to the extent of such excess" (Norwood *v.* Baker, 172 U. S., 269, 279), and that "excess" is not stated in the bill nor is any offer made to pay the actual benefits. And as the District court had the power to decide the question of

such excess and did decide adversely thereto, the language used by the Supreme Court in Wilson *v.* Lambert is pertinent. It was there said:

"We adopt the observation made in the dissenting opinion in the Court of Appeals: 'There can be no reason or propriety in appealing to a court of equity to restrain proceedings that are being conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may arise in the course of the proceeding. To allow litigations to be thus diverted tends to the multiplication of litigation, and the production of unnecessary delay and expense—to say nothing of the unnecessary vexation to parties.' "

Wilson *v.* Lambert, 168 U. S., 611, 618.

II.

The third objection, to the form and effect of the verdict of the jury of seven in assessing benefits, is without merit. The form of the verdict does not invalidate the assessment.

The verdict expressly shows on its face that the plaintiff's property "will be benefited" by the extension and widening of Sherman avenue, as set forth in Schedule 2, which is substantially within the terms of section 11 of the act of March 3, 1899. They therefore complied with the decision in Martin *v.* District of Columbia, 205 U. S., 135, 141, by limiting "the assessment to the benefit actually conferred on these lots." The words "will be benefited" in the verdict is the form used in the verdict in the extension of S street under the act of March 3, 1899 (30 Stat., 1344; Wight *v.* Davidson, 181 U. S., 374), and said section 11 of the act under consideration, in reference to benefits, is in the language used in section 7 of the act declared valid in that case, which held that the doctrine of Norwood *v.* Baker was inapplicable. But why should the plaintiff, without application to the District court, be now allowed to object to the *form* of the verdict, if there be any defect in form?

III.

The fourth objection, made in the tenth paragraph of the bill, is untenable.

It has been decided that the expression of dissatisfaction by others than the party who complains of a confirmation of the verdict of a jury of seven in a collateral proceeding does not inure to non-exceptants; even if the judgment of confirmation is erroneous or voidable, it is not void.

In Buchanan *v.* Macfarland, the court said:

"The contention on behalf of the appellants is, that the filing of objections by any one of the owners of land affected had the effect at once to vacate the verdict of the jury; that the court, thereafter, had no power to do anything else than impanel the new jury of twelve and direct it to make another assessment of damages and benefits; and, therefore, that the subsequent order of confirmation was void and of no legal effect whatever. This last proposition is founded on expressions in opinions in two decisions by this court. Brown *v.* Macfarland, 19 App. D. C., 525, 531; Macfarland *v.* Saunders, 25 App. D. C., 438, 442. The expressions to the effect that the order of confirmation in opposition to the objections against the verdict was null and void must be considered with reference to the questions actually presented for decision. In the first of those cases the objectors appealed from the order confirming the verdict notwithstanding their objections. In the second case the order confirming the verdict had been set aside, on petition of the objectors, in so far as it applied to the assessment of benefits, but confirmed as regards the assessment of damages for land taken or damaged. The Commissioners of the District appealed from this order, which was affirmed. The case at bar stands on entirely different grounds. It is neither an appeal from an order overruling exceptions and confirming the verdict, nor a direct proceeding to set aside the order of confirmation, and open the case to determination by another jury. We think the order of confirmation was absolutely void as against their attack. The appellants were not among the objectors, and it may be presumed that the objectors withdrew or

waived their objections and accepted the result as they had the right to do. See Macfarland *v.* Byrnes, 19 App. D. C., 531, 538, decided on the same day with Brown *v.* Macfarland, *supra.* In that case the Commissioners had moved the court to confirm the verdict as a whole notwithstanding exceptions filed, and the court confirmed the same as to the award for damages and vacated it as to the assessment of benefits which were declared void in accordance with a former decision of this court in regard to the assessment of benefits, which was reversed thereafter by the Supreme Court of the United States. In reversing the order so made, it was said in regard to the right of the objectors to another assessment by the new jury: 'They may prefer to forego that right; and they may prefer no longer to contest the propriety and justice of the assessments. If they so elect, the court will, of course, enter the proper order or decree in the cause. If, on the other hand, they elect further to contest the matter according to law, they should have the opportunity to do so. This court should, therefore, not now direct any final order or decree to be entered by the court below in the premises.' "

Buchanan *v.* Macfarland, 31 App. D. C., 19-20.

Briscoe *v.* Macfarland was a much stronger case for plaintiff on the facts. There the plaintiff appeared and filed objections to the award. The court overruled the objections and confirmed the verdict. Plaintiff then appealed to the Court of Appeals, but subsequently dismissed the same. It was held, in a suit in equity subsequently brought by him to enjoin a sale of his land under a special assessment based upon such award and to vacate the assessment, that the plaintiff was not entitled to relief.

Briscoe *v.* Macfarland, 32 App. D. C., 167.

The disturbance of equation of the assessment need not concern the plaintiff, because such disturbance has no legal effect on the assessment against the plaintiff's property.

Section 3 of the act to extend Rhode Island avenue, considered in Buchanan *v.* Macfarland, Briscoe *v.* Macfarland (*supra*), prescribed the area of the assessment which was

lessened as to the property of those persons who pursued their objections, while parties similarly situated to the plaintiff were held not entitled to enjoin the District of Columbia from collecting the assessments.

IV.

The fifth objection, the effect of the mandate of the Court of Appeals.

The mandate is the one directed to issue in Brown *v.* Macfarland, 19 App. D. C., at page 531. In that case an appeal was taken by Brown from the order of confirmation passed by the District court October 2, 1901, and dealing with him this court said, at page 529:

"The only question, therefore, on this appeal is one of law, *and that is whether the exceptions to the verdict of seven should have been taken and treated by the court as an expression of dissatisfaction with the verdict* BY THE EXCEPTANTS, and thereupon making it incumbent upon the proper authorities, if they desire to proceed with the work of condemnation, to order the marshal to summon a jury of twelve, as directed by the statute."

The meaning of the mandate is plain. It reversed the "order *appealed* from" as to the appellant.

The meaning of the court and the mandate is enlightened by decision subsequent to Brown *v.* Macfarland (*supra*) in a separate appeal from the same order reversed in the Brown case. If the mandate had meant what plaintiff now claims no further appeal was necessary. The court, therefore, interpreted its effect.

In Todd *v.* Macfarland, 20 App. D. C., 176, the court considered the provision for summoning a second jury, WHERE THE APPELLANTS HAD EXCEPTED BEFORE CONFIRMATION OF THE VERDICT, ON DIRECT APPEAL, and said (page 180):

"THE FILING OF THE EXCEPTIONS TO THE VERDICT AND OBJECTING TO THE RATIFICATION THEREOF AS RENDERED, was sufficient evidence of dissatisfaction of the *exceptants with the verdict,* and it thereupon, at once and without move, became necessary *that a second jury should be ordered,* AS TO THE PROPERTY OF THE EXCEPTANTS."

Again the court said (page 184):

"But because the appellants *by their exceptions* to the verdict of the jury of seven, expressed and made known their dissatisfaction with that verdict as rendered, and thereby became entitled to a jury of twelve, the order of the court below * * * must, *as to the appellants,* be reversed" (Todd *v.* Macfarland, 20 App. D. C., 176).

The court said also (page 180):

"And applying here the terms of the statute, and the express decision of this court thereon, it follows that the order of the court ratifying the verdict of the jury of seven, over the exceptions of the appellants, must be reversed, so far as the same applies to and affects the lands of the appellants."

The expression of dissatisfaction having been limited to the "exceptants," and the order "appealed from" having been reversed, it is clear that the court below was bound to construe the mandate as reversing the order of confirmation only as to the appellants in Brown *v.* Macfarland and Todd *v.* Macfarland, both of which cases were direct appeals to this court.

V.

The sixth objection, the effect of the act of Congress approved June 29, 1906, *providing for reassessment of benefits in the matter of the extension and widening of Sherman avenue.*

The cases of Brown *v.* Macfarland (19 Appeals, p. 525, decided April 1, 1902), Todd *v.* Macfarland (20th Appeals, p. 176, decided May 20, 1902), and Saunders *v.* Macfarland

(25th Appeals, p. 438, decided April 18, 1905) left the law undetermined as to the effect of the objection of some of the parties interested upon the remainder of the verdict who had made no objection thereto—that is to say, whether the objection of some of the parties vacated the verdict in toto, necessitating the summoning of a jury of twelve to review the entire matter *de novo,* or whether the ratification of the verdict would be valid in so far as it was not objected to. This question was also involved in the cases of Buchanan *v.* Macfarland, Briscoe *v.* Macfarland, and Shea *v.* Macfarland, pending in equity, in all of which the construction of the provision of chapter eleven, R. S. D. C., respecting the effect of objections of parties interested was in issue.

In the Sherman Avenue case (District court, No. 555), after the order of the court ratifying the original verdict in its entirety over the objections of some, all of the awards were paid by the District to the parties entitled thereto, and a very large proportion of the assessments were paid by the parties assessed.

To proceed with a jury of twelve on the theory that the objections of some had vacated the original verdict in its entirety would under these circumstances involve many complications, and would have been at variance with the decisions rendered since the act was passed. The primary purpose of the act of June 29, 1906, was to provide a certain method of relevying those assessments which had been vacated without the necessity of involving the awards and the other assessments in a second hearing, and for the further purpose, if necessary, and as a measure of precaution, to authorize the court to ratify and confirm the verdict as to the awards and assessments which were not objected to, if it became necessary to do so by reason of the subsequent action of the courts on the pending question referred to.

There being no question as to the necessity for proceeding for reassesssment as to those assessments which had been objected to, supplementary proceedings were begun for that

purpose, under the provisions of the said act, but the authority given to ratify and confirm the verdict in other respects was never exercised because it never became necessary.

The question pending in the Briscoe and other cases was in the meantime decided by the Court of Appeals to the effect that the order of ratification was valid and final as to non-exceptants, which decisions rendered recourse to the provisions of the act of June 29, 1906, which authorized the court to confirm the verdict with respect to interests which did not object, unnecessary.

The Commissioners of the District have consistently treated the original order of ratification as valid and final with respect to the assessments to which no objections were taken, and indeed the act does not direct them to proceed in such case.

They were placed upon the assessment books and have been kept there without interruption, and at the expiration of the period within which the assessments were required by law to be paid the Commissioners advertised the properties assessed for sale by reason of default of payment, and they are defendants in this case because of that fact.

While it might be implied that the authority granted by the act of June 29, 1906, was non-existent prior to its enactment, as in the case of any enabling or validating act, this is by no means a necessary implication, and certainly the act could not by any construction have the effect of invalidating a prior order of the court, an order precisely similar to which has since been held a valid and final judgment.

If that is contended to be its effect, then the awards are invalidated also, for the act authorized the court to ratify the "verdict, *awards* and assessments." The argument that by inference this authorization invalidates the prior order of the court must extend to the awards also, which leaves the complainants here in the position of having received awards to which they were not entitled, and which are not offered to be returned.

But the question of the validity of the order of ratification, as to non-exceptants, being one pending in the courts, the act properly, in the judgment of counsel, did not undertake to interfere with the court either to validate or invalidate it, but left the question with the courts, providing, however, a curative in case the decision of the court rendered further action necessary.

In the case of Macfarland *v.* Elverson, 32 Apps., p. 81, the court below had held that the Commissioners of the District of Columbia were without authority to condemn a right of way for a sewer unless the project was specifically authorized by Congress. Pending an appeal by the District of Columbia a bill was introduced into Congress to specifically authorize the Commissioners in the premises, which bill failed of passage. This fact was strongly relied upon by the appellees in the argument as a recognition by the Commissioners of a want of authority in the premises by which they were concluded. While this question is ignored in the written opinion of the court, the expressions from the bench during the argument were to the effect that the point was untenable.

The effect of the act of Congress could not be to invalidate the judgment confirming the verdict of the jury of seven as to non-exceptants.

In December, 1893, Congress passed an act to extend North Capitol street to the Soldiers' Home, and proceedings were taken under that act by the Commissioners of the District of Columbia. After exceptions filed by the District to the action of the Supreme Court of the District of Columbia confirming the report of the Commissioners appointed to appraise the land at the term of court which expired by the first Monday of July, 1894, on August 7, 1894, Congress passed an act which provided that:

"The Supreme Court of the District of Columbia is hereby directed to vacate its order confirming the report of the Commissioners appointed to appraise the value of the lands of the Prospect Hill Cemetery and Annie E. Barbour, proposed to be taken for the extension of North Capitol street to the

Soldiers' Home; and the Commissioners of the District of Columbia are hereby directed to proceed to carry into effect said act, and to acquire the title by condemnation, according to Chapter II of the Revised Statutes of the United States relating to the District of Columbia."

Thereupon the District endeavored by motion to have the order of confirmation vacated, but the motion was overruled and from the order overruling that motion an appeal was taken. The case is known as District of Columbia *v.* Prospect Hill Cemetery, 5 Apps. D. C., 497. This court held that it could not review the action of the Supreme Court of the District of Columbia in refusing to vacate the order of confirmation; that said court was without jurisdiction to entertain the motion, and that the power of said court had ended with the term except that its order might have been set aside for fraud, deceit, surprise, or irregularity.

The twelfth section of the act to extend Columbia road (June 6, 1900, 31 Stat., 665) provided that the Commissioners of the District of Columbia should make application to the Supreme Court of the District of Columbia for a final ratification and confirmation of the awards of the jury in the matter of the extension of Eleventh street (see act of March 3, 1899, to extend S street, section 3 referring to Eleventh street); that the awards, when ratified, should be paid in accordance with the provisions of the act which authorized the extension; and that, if for any reason the assessment of benefits should be declared void, the Commissioners should make application to the court to reassess them.

In Macfarland *v.* Byrnes (19 App. D. C., 537), the court observed:

"There is, however, a third consideration, which we cannot ignore in the disposition of this case. By the act of Congress of June 6, 1900, already mentioned it was provided that, if for any reason the assessments for benefits should be declared void, the Commissioners should make application to the court for a reassessment. This evidently has no reference to the invalidity consequent upon judicial decision of

the unconstitutionality of the act of Congress, of March 3, 1899, for there could then, of course, be no lawful reassessment, since the foundation for the whole proceeding would fail. The holding of this court that the act of March 3, 1899, was unconstitutional did not therefore avail to set in motion the instrumentalities of the act of June 6, 1900, for reassessment. And when the Supreme Court of the United States held the act of 1899 to be a constitutional and valid exercise of the legislative authority all reason for reassessment under the act of 1900 vanished."

VI.

The seventh objection, that the act for the extension and widening of Sherman avenue is unconstitutional.

The plaintiff asserts that the act is unconstitutional because it seeks to impose on the owners of land within the prescribed area the burden of at least one-half of the cost of the land condemned without any regard whatever to benefits.

This contention ignores the provisions of section 11 of the act, which is substantially the language of section 7 of the act construed to be constitutional in Wight *v.* Davidson, 181 U. S., 371.

That legislative determination of the existence of benefits and the area of assessment for benefits is constitutional is well established. Section 3 of the act entitled "An act to extend Rhode Island avenue," approved February 10, 1899, is almost literally identical in determining the existence of benefits and the area thereof.

The act to extend Rhode Island avenue has recently been declared constitutional.

In Buchanan *v.* Macfarland (*supra*) this court said of the latter act:

"There is no doubt of the power of Congress to authorize the extension of streets, and the assessment of adjacent lands to the extent of the benefits thereby received, in a designated taxing district."

In Briscoe *v.* Macfarland, *supra,* speaking of the same act this court said:

"Congress had the power to order the extension of the avenue, the condemnation of the lands therefor, the designation of the taxing district for the assessment of benefits, and the giving of notice to the owners of land therein by publication" (Briscoe *v.* Macfarland).

"It is within the power of the legislature of the State to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, and it was not the intention of this court, in Norwood *v.* Baker, to hold otherwise."

Webster *v.* Fargo, 181 U. S., 394, 395.

See also:

Wight *v.* Davidson, 181 U. S., 371.
French *v.* Barber Asphalt Paving Co., 181 U. S., 324.
Parsons *v.* D. C., 170 U. S., 45.
Walston *v.* Nevin, 128 U. S., 578.
Spencer *v.* Merchant, 125 U. S., 345.
Bauman *v.* Ross, 167 U. S., 548.
Mattingly *v.* D. C., 97 U. S., 687.
Shoemaker *v.* U. S., 147 U. S., 282.
Hager *v.* Reclamation Dis't No. 108, 111 U. S., 701.

VII.

The plaintiff having allowed the verdict of the jury of seven to be confirmed without excepting thereto and having, after said confirmation, demanded payment of the damages awarded by the said jury and received the same, is estopped to contest the legality of the assessment for benefits contained in the same verdict.

The verdict of the jury was an entire verdict and was required to be ratified or set aside as found by the jury, as applied to or as affecting any particular parcel of land. The plaintiff has so treated the verdict and award. If the verdict

be ratified as to damages awarded but set aside as to assessment for benefits the land owner would be exonerated because there is no provision in the law that would authorize subsequent separate assessments in such case. Such was not the intent of the law.

Todd *v.* Macfarland, 20 App. D. C., 181-182.

In the case at bar the plaintiff accepted the ratification of the whole verdict, and pursuant thereto demanded and received payment of the damages awarded him.

The doctrine of estoppel in assessment cases is fully discussed by Page and Jones in their work "Taxation by Assessment," vol. 2, chap. XIX.

Conclusion.

No attack is made on the sufficiency of the advertisement nor is it asserted that any reason existed which prevented the public authorities from collecting the assessments, except reasons noted going to the validity of the assessments.

It has been shown that no cause existed for lessening the public revenue by enjoining the collection of the tax at the time advertised and by the sale advertised.

It is respectfully submitted that the decree appealed from should be reversed.

EDWARD H. THOMAS,
Attorney for Appellants.

IN THE Henry W. Hodges, Clerk.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1909.

No. 2010.

HENRY B. F. MACFARLAND AND OTHERS, APPELLANTS,

vs.

CHRISTIAN F. UMHAU, APPELLEE.

ARGUMENT AND BRIEF IN BEHALF OF APPELLEE.

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Attorneys for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

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ARGUMENT AND BRIEF IN BEHALF OF APPELLEE.

Statement of the Case.

The appellee, Christian F. Umhau, is the owner of lots numbered one hundred and forty-two (142) and one hundred and forty-three (143), in Wright and Dole's subdivision of certain lands in the District of Columbia abutting on Sherman avenue. He became such owner in May, 1896. At that time the avenue was fifty feet wide. The lots, according to a recent numbering, are now known as lots numbered 141 and 142, in square numbered 2882.

By an act of Congress, approved March 3, 1899, the Commissioners of the District were authorized and directed to

institute proceedings to condemn enough land to extend and widen Sherman avenue to the width of one hundred feet from Florida avenue to Whitney avenue. The act provided that not less than one-half of the amount found due and awarded as damages for lands taken for the extension should be assessed on the lands abutting on Sherman avenue "to a distance of three hundred feet from the building lines on the east and west of the avenue."

In accordance with the authority thus vested in them, the Commissioners procured a jury to be summoned to assess the damages, if any, and for such further proceedings "as are contemplated by said act of Congress and by chapter eleven of the Revised Statutes of the United States relating to the District of Columbia." The jury found that the value of the lands condemned was $144,587, and assessed exactly one-half thereof, or $77,293.50, on the lands east and west of Sherman avenue to a distance of three hundred feet which they found would "be benefited by the widening and extension of said avenue." Of this sum $880 was apportioned against appellee's lots "arbitrarily," as he says in his bill, which amount he avers was greatly "in excess of any benefit accruing to said lots by reason of said extension and widening," or "any benefit that can possibly accrue hereafter."

The bill then further charges that since the avenue was widened the trend of prices has been downward, and recent sales have been made at figures much less than were voluntarily paid by the District for lands needed for the extension, and accepted by the land-owners, for there was not at any time any such final order of condemnation as would have justified the authorities in entering upon and forcibly taking possession of the lands needed for the extension.

The bill further charges that the jury of seven in their verdict did not undertake to ascertain and determine what benefits would accrue from the extension of Sherman avenue to lands within the designated district, but simply appor-

tioned $77,293.50 amongst the lands which they found "will be benefited" and without attempting to find actual benefits.

On the incoming of the verdict of the jury of seven many owners of land indicated their dissatisfaction therewith by filing exceptions to the verdict, as provided in section 263, R. S. D. C. Appellee filed no exceptions because he was advised that the extension of said avenue was to be made only on condition that one-half the amount awarded as damages should be collected by assessments, and that if any of the exceptions were sustained it would destroy the equation and necessitate a jury of twelve.

Notwithstanding the dissatisfaction with the verdict of the jury of seven so indicated by many property owners affected thereby, the verdict was confirmed by an order passed in the condemnation proceeding. An appeal from this order was taken, and on the first day of April, 1902, the order was reversed in this court, and the cause remanded to the Supreme Court of the District of Columbia "that proceedings may be taken and a jury of twelve ordered as directed by the statute."

No action was thereafter taken by the Commissioners looking to the summoning of a jury of twelve, as directed by this court, but the Commissioners advocated and procured the passage of the act of Congress, approved June 29, 1906, for a reassessment of benefits (although no such assessment had theretofore been made) under and in accordance with the act of Congress approved June 6, 1900, which act had for its primary object the extension of Columbia road. This act provided that assessments should be levied as benefits "to the extent of such benefits" against lands in a specified zone, and against "any or all pieces or parcels of land that will be benefited by the extension of said Columbia road."

The bill further charges that it would be inequitable and unfair to require the appellee to pay the sums assessed against his lots without any regard whatever to benefits actually conferred and greatly in excess of such benefits, and

to require persons who excepted to the verdict of the jury of seven to render only an equivalent in money for the special and peculiar benefits to their lands, if any, conferred by the widened and extended street. And for the reason that the act of March 3, 1899, seeks to impose on the appellee and other land-owners at least one-half of the cost of the land condemned without regard to benefits conferred, the bill charges that the act is unconstitutional and void.

After the verdict of the jury was ratified it was certified to the assessor of the District and entered on his books as a tax and has been so carried ever since, even after the order of the District Court, affirming the verdict, had been set aside, although the act of March 3, 1899, provided that such assessments should not operate as a tax until confirmed by the court. By retaining said assessments on the books as a tax the Commissioners have exacted payment of assessments by refusing to admit subdivisions to record or issuing certificates that the lands were free of taxes.

Recognizing that said assessments could not be collected by compulsory processes until confirmed by the court, and, the verdict being entire, that the court was without jurisdiction to confirm it in part without further and enabling legislation, the Commissioners procured the passage of the act of June 29, 1906, which authorized the Supreme Court of the District of Columbia to ratify and confirm the verdict "as to all those pieces or parcels of land with respect to which no objection has been filed to said confirmation, and to condemn the land necessary for the said widening and extension of Sherman avenue." But no order of ratification or confirmation has since been applied for or obtained. Although the verdict of the jury of seven had not been ratified as directed by the act of June 29, 1906, and notwithstanding the other matters and things set forth in the bill, the appellee's complaint discloses that the Commissioners advertised his lots for sale as for default in the payment of these assessments at public auction at the annual tax sale beginning on the ninth day of March, 1909.

The bill prayed that the Commissioners be temporarily enjoined and restrained from selling appellee's lots under their advertisement and that the assessments be vacated and set aside and for nothing held. A restraining order was issued as prayed and the 12th day of March fixed for further hearing.

The defendants answered the bill, admitting all the material averments of fact. The cause came on for hearing on bill and answer and the restraining order was continued until final hearing. From this order the Commissioners appealed.

ARGUMENT.

I.

The Commissioners exceeded their authority in undertaking to sell appellee's lands as for non-payment of an assessment not legally levied. They were, therefore, properly enjoined.

The Commissioners, as authorized and directed by the act of March 3, 1899, instituted their petition in the Supreme Court of the District of Columbia on the 31st day of May, 1899, asking that a jury of seven be summoned to assess damages for lands needed for the extension of Sherman avenue, "and that such further orders may be made and proceedings had as are contemplated by the said act of Congress and by chapter eleven of the Revised Statutes of the United States relating to the District of Columbia to the end," &c., &c.

It is manifest at a glance that the Commissioners, in formulating their petition, were not quite sure of their ground, or what particular form of relief to ask for. They did not ask for an assessment of the benefits which each piece or parcel of ground might derive from the contemplated improvements, for the law was silent on that subject.

They did not ask that one-half of the amount awarded as damages should be arbitrarily assessed on lands in a designated district, for that might have called attention to the inherent weakness of the law from a constitutional standpoint. So they asked the court in vague and general terms that "such other and further orders be made and proceedings had as are contemplated" by the act referred to.

The bill charges that the jury did not undertake to assess benefits to the extent that the several parcels of ground might be benefited, but only apportioned one-half of the very large sum awarded as damages amongst the lots within the prescribed area which they found would "be benefited" by the proposed public improvement. But actual benefits and their extent they did not take into consideration. They merely say that they "hereby assess the sum of $77,293.50 * * * against those pieces or parcels of ground abutting on Sherman avenue as widened and extended which we find *will be benefited* by the widening and extension," &c., &c. Such a finding does not furnish a sufficient basis for the assessment.

In

State, Hoboken, &c., Company *vs.* Mayor, 36 N. J. L., 292,

the question under consideration was the validity of an assessment for improving Eighth street in the city of Hoboken. The city charter provided

> "that the Commissioners shall examine into the whole matter and shall determine and report in writing to the council what real estate ought to be assessed for such improvements and what proportion of such expenses shall be assessed to each separate parcel or lot of land, and that the assessment shall be made upon and paid by the lands and the real estate benefited by the improvement in proportion to benefit received."

Commenting on the report of the Commissioners, the court say:

> "They say they have assessed the cost of the work according to the provisions of the charter upon the property benefited by the same, but they do not certify or show that they imposed the burden in proportion to the benefits received."

Later along in the opinion the court say:

> "In this case, it appearing beyond controversy that there is an excess of expense over benefits, private property is taken *pro tanto* for public use without compensation. That which is received by the land owner is not equal to what is taken from him. The excess of cost cannot, in the legitimate exercise of the power of taxation, be thrown exclusively upon the persons subject to assessment in this case. If there are no other lands to which benefits reached, it is a burden which the public ought to bear and it should be levied by general taxation. The legislative act confers upon the corporation no power to impose a burden on the property owner, in excess of benefits accruing to him, and if it did, it would be unconstitutional and void."

In another somewhat similar case the court say:

> "They (the assessors) certify that they made the assessment upon principles of equity and that 'we did in our judgment consider and adjudge that the owners of the said several lots and plots of ground were the parties benefited, and upon whose lands and plots the assessment should be made,' but this language does not imply that they took into consideration all the real estate of the town, and determined what part of it and how far it was benefited or damaged and assessed accordingly."

The assessment was set aside.

State *vs.* Town of Bergen, 30 N. J. L., 307.

In State *vs.* Mayor, &c., 27 N. J. L., 214, the syllabus is:

> "Commissioners appointed under the charter of the City of Hudson to make assessments for regulating and improving streets, &c., should ascertain the whole amount of lands benefited and should report to the common council the amount that each lot assessed is benefited by the improvement.
>
> "A report only showing the whole cost and the items making up that amount, and then assessing it on several lots in proportion to their front feet on the street is not sufficient."

Commenting on the case the court say:

> "It was the duty of the Commissioners in the first place to ascertain all the lands benefited. They were in the next place to ascertain how much each lot was benefited by the expenditure and to adjudicate the amount each was to pay in proportion to the benefit. This required great care and discrimination to do them justly. It not only does not appear from their report that they did this, but it appears affirmatively that instead thereof they merely applied the Procustean rule of dividing the aggregate expense by the number of lots fronting on the avenue and placing it equally on all. For this purpose there was no necessity of the gravity of a commission—the clerk of the could could have done it without leaving his office. It was only one sum in simple addition and another in long division."

See also—

Warren *vs.* Grand Haven, 30 Mich., 30,

and, for a full discussion,

The Tidewater Co. *vs.* Coster, 3 C. E. Green, 518.

In Brown *vs.* Macfarland, 19 App. D. C., 525, the regularity of the proceedings of the jury of seven, by which the assessments now complained of were returned, was considered. The appellants in that case, owners of some of the lands affected, and other property owners, had filed excep-

tions to the verdict, thereby indicating dissatisfaction therewith. The act of March 3, 1899, directed that proceedings should be conducted under and in accordance with the provisions of sections 257-267 of the Revised Statutes of the District of Columbia. These required that there should first be a jury of seven and the effect to be given to their verdict was clearly and unmistakably stated in section 263, which is as follows:

> "If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury."

Under this section the verdict of a jury of seven is merely tentative; it becomes a nullity "if the proper authorities or any owners of the land are dissatisfied" with it. On the incoming of such objections the court is powerless to pass upon the reasonableness of the exceptions, or confirm or reject the verdict, for the law is mandatory, and says when dissatisfaction with such a verdict is indicated "the marshal shall be ordered to summon a second jury of twelve," etc. The matter of awards of damages and assessments of benefits, as found by a jury of seven, and whether reasonable or grossly excessive, is not the subject of review by the court. That is left by the statute to rest exclusively with the proper authorities and the land owners. If they are satisfied, the verdict stands; if either is dissatisfied, the marshal shall summon a second jury of twelve, and their verdict shall be recorded as final and conclusive (sec. 264).

In Brown's case the court held that when the dissatisfaction was expressed with the verdict of the jury of seven, pro-

ceeding under the highway act, the submission of the matter of condemnation to a jury of twelve was an "express mandate of the statute," which the court could not disregard and that it was the duty of the authorities to have a second jury summoned. In the opinion of the court, announced by the late Chief Justice, it is said:

> "The owners of lands proposed to be condemned are placed in the position of defendants or opponents of the proceeding of condemnation; and, consequently, all affirmative acts prescribed by the statute in perfecting the proceeding must be shown to have been complied with by the parties authorized to take and prosecute the proceeding. The whole proceeding is strictly statutory, and it must be affirmatively shown that all the provisions of the statutes that apply to the proceedings have been substantially complied with. Otherwise the whole proceeding would be *void and without effect.*"

This rule is stated by the late Justice Field in

French *vs.* Edwards, 13 Wallace, 506:

> "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are *intended for the protection of the citizen, and to prevent a sacrifice of his property,* and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

The paramount purpose of the act was the widening and extension of Sherman avenue, but the condition on which this must be accomplished was that of the amount found due as damages one-half thereof should be assessed *"by said jury in said proceedings"* against the lands within a designated area. The extension was not to be made unless the assessment for benefits was at least one-half of the damages awarded. This was the indispensable foundation of the proceeding. The benefits and damages were thus inseparably yoked together. The equation must have and retain these proportionate factors; otherwise Congress in effect declared that the extension could not be made.

Necessarily, therefore, the award of damages, and the assessment of benefits, under the then existing law, must be made by the same jury. The verdict could not be confirmed in part and set aside in part, for that would destroy the equation between award and assessment. The assessments against the lands of Brown and the other persons who had indicated dissatisfaction with the verdict, aggregating about one-third of the total amount assessed, were set aside, with the result that not one-half but two-thirds of one-half only of the award of damages was assessed. Recognizing that under the act the extension could be made only on condition that the assessment equaled at least one-half the award of damages, this court reversed the order confirming the verdict *in toto,* and remanded the cause "to the Supreme Court of the District of Columbia that proceedings may be taken and a jury of twelve ordered as directed by the statute." This order of reversal was entered on the first day of April, 1902. More than four years passed without any action being taken by the Commissioners to summon a jury of twelve and no other move was made by them in the condemnation proceedings. Meanwhile the legal department of the District government seems to have reached the conclusion that nothing could be done under existing law, and that the District Court was without jurisdiction to ratify the verdict

of the jury of seven *in part* without further and enabling legislation. Wherefore the Commissioners procured the passage of the act of Congress approved June 29, 1906. This act is as follows:

"An Act to Provide for the Reassessment of Benefits in the Matter of the Extension and widening of Sherman Avenue, in the District of Columbia, and for Other Purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Supreme Court of the District of Columbia, holding a United States district court, is hereby authorized to finally ratify and confirm the verdict, award, and assessment of the jury found and returned in cause numbered five hundred and fifty-five in said court, in the matter of the extension and widening of Sherman avenue from Florida avenue to Whitney avenue, in the District of Columbia, as to all of those pieces or parcels of land with respect to which no objection has been filed to said confirmation, and to condemn the land necessary for the said widening and extension of said Sherman avenue; and in case any assessment for benefits against any piece or parcel of land mentioned in said verdict has been or may be vacated by reason of objections filed thereto, or for any other reason, the Commissioners of the District of Columbia are hereby authorized and directed to make application to said court for a reassessment of such benefits under and in accordance with the terms and provisions of the act of Congress approved June sixth, nineteen hundred, entitled 'An Act for the extension of Columbia road east of Thirteenth street, and for other purposes;' and said assessments of benefits shall have priority over all deeds of trust, mortgages, judgments, and other liens."

Section twelve of the act of March 3, 1899, provides: "That when confirmed by the court the assessment shall be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia"—that is, by a sale of the property. Not until due and proper confirmation, therefore, did the assessment become a lien on the land, enforceable by a sale of the property. By the act of June 29, 1906, above quoted, the Supreme Court of

the District of Columbia was authorized "to finally ratify and confirm the verdict, award and assessment of the jury * * * as to all of those pieces or parcels of land with respect to which no objection has been filed to said confirmation." This was what might, perhaps, be called a legislative determination that further action on the part of the court was necessary to validate the assessment. But no such order of confirmation was applied for or obtained, and until that was done the Commissioners had no right to advertise the appellee's property for sale.

Wherefore the attempted sale was properly enjoined. The jurisdiction of the equity court to do this was fully sustained in Buchanan's case, 31 App. D. C., 6, and in Norwood *vs.* Baker, 172 U. S., 269.

Near the conclusion of his brief the Corporation Counsel contends that the appellee is *estopped* from contesting the validity of the assessment because he allowed the District authorities to pay him for so much of his land as was taken and actually used for the proposed extension.

One of the necessary elements of *estoppel in pais* is that the other party must have been induced to act. Here there could have been no such inducement for the District authorities paid all awards of damages as well to those who excepted to the verdict as to those who did not. These awards were paid while the appeal in Brown's case was pending. Wherefore it is manifest that appellee's failure to object to the verdict because of excessive assessments had no effect whatever upon the payment of the award. That the awards were paid before the appeal in Brown's case was heard, suggests that the prices allowed for lands taken were considered favorable to the District and perhaps less than might be found by a jury of twelve. They were no doubt advised by the Corporation Counsel that if the property owners could be induced to accept the awards they would thereafter be estopped from claiming that the amount allowed was not

fair compensation for the land taken and subsequently claim more (Rhodes *vs.* Booth, 14 Iowa, 594), or that the proceedings were not valid because of incompetency of one of the jurors (Chatterton *vs.* Parrott, 46 Mich., 432), or that the proceedings were otherwise irregular (Town *vs.* Blackberry, 29 Ill., 137, and Karber *vs.* Nellis, 22 Wis., 207).

The receipt of the price fixed upon as its fair market value in such case is regarded as an act of dedication of the lands needed for the public improvement. So here, appellee would be estopped from asserting that the title of the District to the land for which he has been paid is not good and indefeasible for the purposes of a public highway as against any claim he might set up. But estoppel could go no further, for the valuation put upon the land was in no way affected by assessments subsequently made, nor was it a condition express or implied that appellee's land was worth what the jury allowed only in the event that he paid any assessment that might be made against other lands belonging to him.

The case at bar is so like *Norwood and Baker* as to come within the meaning of the familiar phrase, "all fours!" In Mrs. Baker's case the jury appraised the value of her land needed for the proposed street at $2,000, and that sum was accepted by her as just compensation. Then the village council assessed back against the land all that had been so paid, $2,000, and $218.58 besides, for the costs of condemnation. When an effort was made to enforce payment of the assessment, she brought suit for an injunction and she was not estopped from so doing by the fact that she had accepted payment from the village for her land. In her case the *jury* valued her land and the *village council* levied the assessment.

In this case the function of the jury was twofold:

First. It was directed to award damages for lands taken—that is, ascertain and fix the fair market value of the land needed for the extension and widening of Sherman avenue.

This valuation necessarily was made without considering from what source the money would come to pay for it—whether from the public treasury or from local assessments.

Second. When and after damages had been awarded the jury was directed to divide the gross sum by two and apportion one-half of the amount on lands within a specified district, not any particular sum on any given piece of land. In the apportionment they assessed against the lands of appellee the sum of $880, which he in his bill says was greatly in excess of his proportion of the entire sum and greatly in excess of any benefit conferred on him by the improvement.

In *Norwood and Baker* it was stated in the opinion of the court that the quashing of the assessment there complained of did not relieve "the abutting property from liability for such amounts as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it" (French *vs.* Barber Asphalt Paving Co. 181 U. S., 344-5).

So here. Appellee is seeking in this action relief only against an illegal assessment, and not to avoid paying towards the cost of the proposed improvement a sum of money equivalent to the benefit he received from the widened and extended street.

Other similar assessments, made by this jury of seven, many of them, have been set aside, but this did not have the effect of relieving the lands affected from responding to a new assessment, "for so much of the expense of the opening of the street as was found upon due and proper inquiry to be equal to the special benefit accruing thereto." For on the 30th day of June, 1906, the act of Congress was approved providing for the reassessment of the amount of benefits conferred where previous "assessments had or may

be vacated by reason of objections thereto or for any other reason." "For any other reason," as so used, means and can only mean action by the court—for the assessments could be set aside in one of two ways only, objections by the parties or action by the court.

It is difficult to understand just why the authorities did not desire a reassessment all along the line of Sherman avenue unless it be that the apportionment plan, as directed by the act of March 3, 1899, would put more cash into the District treasury than an assessment to the extent only of benefits, as called for by the act of June 30, 1906. And since this action was begun, the jury empowered under the last-mentioned act has filed its verdict, limiting assessments to such sums as in their judgment represent benefits actually conferred.

In the opening of his argument, at page 10 of his brief, one of the reasons assigned why the matter of this assessment should not be reviewed is thus stated: "and, third, because the lapse of time since said verdict was filed (May 9, 1900), is too great to obtain reliable evidence on the subject," and yet at the time the brief was written the jury had proceeded to make a new assessment and sufficient "reliable evidence" was adduced by the Corporation Counsel to warrant the jury in returning a new assessment.

The infirmities pointed out in the bill are not all the irregularities that surround and envelope the efforts of the Commissioners to enforce the collection of this most extraordinary assessment.

For instance, in his statement of the case, at page 9 of his brief, the Corporation Counsel figures that by the curative act of July 1, 1902, the District became entitled to charge and collect interest on the assessment from December 2, 1901, and the advertisement calls for interest from that date (R., p. 8). But in Buchanan's case (31 App. D.

C., 22, 23), this Court held that the curative act was not retroactive and that interest could be charged on such assessments only from the date of the passage of the act.

Again, at page 7 of his brief, the Corporation Counsel says that the Commissioners are "proceeding in said District court case against those owners of property who had excepted to said award before the confirmation and that they are not proceeding against the complainant or his property."

But in the proceedings referred to, the Commissioners are not doing their full duty, for by the act of June 30, 1906, they are not only authorized but *directed* to make application for reassessment "against any piece or parcel of land mentioned in said verdict" when the first assessment "has been or may be vacated by reason of objections filed thereto or for any other reason." As has been pointed out, the verdict of the jury of seven was ratified and confirmed as an entirety in the District court on the second day of October, 1901. But on appeal this order was reversed, the verdict set aside *in toto,* and the assessment vacated for the other reasons referred to under the act, namely, by the order of the court.

But further, as was said by this court in

> Electric Light Company *vs.* Club, 6 App. D. C., 544:
>
> "The order appealed from is merely an interlocutory order, a conservative measure intended to preserve existing conditions and to save all rights until the merits of the controversy can be definitely ascertained by such proofs as the parties may be able to adduce. It is not an adjudication of rights in any proper sense of the term; and while, of course, under such circumstances, an injunction, when granted, must be in the line of the relief prayed for by a complainant and based upon a *prima facie* claim of right made out by the complainant, yet it does not follow that the final adjudication will be in accordance with the interlocutory order. We recall this

> elementary principle merely to reinforce our idea that, although the right of appeal is allowed in such cases and parties are entitled to have such appeal determined, yet we should not lightly disregard the action of the court below, or reverse that action, unless it is made very plain to us either that such action was erroneous, or that it is in the interest of justice that it should be vacated. One who appeals from a merely interlocutory order should, therefore, show a very strong case to overthrow action intended in its very nature to give the court reasonable opportunity to determine the question of right in the controversy between the parties."

"No very strong case has been shown," or can be shown, why the order of the court should be reversed. For nearly seven years after the verdict was filed the authorities deferred making a forcible demand that the appellee pay what he claims is an illegal assessment, and one not validated as required by the statute. The consequences to him of the advertised sale might have been serious and have had the effect of depriving him of his freehold, whereas the only possible inconvenience to the District will be the slight delay necessary for a judicial ascertainment of the legality of the assessment, which, if valid, takes precedence of any and all liens put upon the property by the appellee. It cannot be, perchance, that the District Commissioners are apprehensive that the downward current of values of property abutting on Sherman avenue since its widening and extension may in another year bring it about that the property will not sell for an amount equal to the "benefit" conferred by the improvement.

II.

The act of March 3, 1899, is unconstitutional for that, if the assessment features are enforced, it will appropriate private property to public use without just compensation.

The act of March 3, 1899, authorized the extension of six streets. Sections two and six, relating to Pennsylvania avenue and Twentieth street, provide that one-half the amount awarded as damages should be assessed on lands lying on each side of the street, "and also on any or all adjacent pieces or parcels of land which in the judgment of the jury will be benefited by the said extension as herein provided." With regard to the four other streets mentioned in the act nothing is said about benefits.

Section five, relating to Sherman avenue, contains no such provision. It directed and required "that of the amount found due and awarded as damages for and in respect of the land condemned under this act for the extension and widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines on the east and west sides of Sherman avenue as widened and extended."

There is not a word or hint about benefits in this section, but a peremptory direction to assess one-half the damages arbitrarily on lands within a narrow radius, irrespective of benefits.

The bill charges that the assessment of $880.00 against appellee's lots is greatly in excess not only of any benefits that have accrued to his lots by reason of the scheme of extension, but also in excess of any benefits that can possibly hereafter accrue from the completed street. To the con-

trary, he shows that the lands abutting on Sherman avenue are worth less in the market today than they were estimated to be worth by the jury of seven in 1900, an estimate deemed fair and reasonable by the District Commissioners at the time.

The theory underlying the doctrine of local assessments is that the value of the contiguous and adjacent property is enhanced by an improvement of a public character such as the opening and improving of streets and highways, the property thus receiving a special and peculiar benefit, not shared by the property remote from the *locus* of the improvement. Upon such property, therefore, a part or the whole of the cost of such public improvement may fairly be assessed to an amount not exceeding the amount of such special and peculiar benefit. The owner of the property is no worse off by reason of the entire transaction, for the assessment takes from him no more than the benefit of the public improvement has conferred; or, to state it differently, the benefit conferred constitutes just compensation for property of which he has been deprived for public use.

As was most aptly said by the late Justice Morris, there is "discordant tenor of judicial decision" on this difficult question, but from the more recent decisions of the Supreme Court the following corollary is deducible:

The cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; any substantial excess is a taking of private property for public use without compensation.

To make this clear it will be necessary to review and analyze some of the leading cases.

Willard *vs.* Presbey, 14 Wall., 676.

arose over an act of Congress authorizing the corporation of Washington to "levy taxes on particular wards, parts or sec-

tions of the city for their particular local improvements." The court held that assessments under this act for grading and paving a part of Fourteenth street, levied against property fronting the street, were valid.

Davidson *vs.* New Orleans, 96 U. S., 97:

The controversy in this case arose over an assessment on certain real estate made under statutes of Louisiana for draining swamp lands within the parishes of Carroll and Orleans.

Hagar *vs.* Reclamation Dist. No. 108, 111 U. S., 701:

In this case the act of the legislature of California for reclaiming swamp and overflowed lands and assessing the cost on the lands reclaimed or benefited was upheld.

In Spencer *vs.* Merchant, 125 U. S., 345,

the court, Mr. Justice Gray delivering the opinion, held that the legislature of New York "in the exercise of the power of taxation has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion" (355).

(Mr. Justice Matthews and Mr. Justice Harlan dissented.)

Walston *vs.* Nevins, 128 U. S., 578,

arose over an assessment for "local improvements," though the report does not show the character of the improvements. The assessment was held valid.

Illinois, &c., Railroad *vs.* Decatur, 147 U. S., 190,

arose over an assessment for grading and paving a street. Held valid.

In Paulsen *vs.* Portland, 149 U. S., 30,

the court upheld an assessment to pay for the cost of a sewer in the city of Portland.

Mattingly *vs.* The District of Columbia, 97 U. S., 687,

arose over assessments for special improvements (grading, sidewalks, and setting curbs) in the city of Washington under an act of Congress. The assessment was sustained.

In Bauman *vs.* Ross, 167 U. S., 548,

there came up for consideration the act of Congress to provide a permanent system of highways in the District of Columbia, and more particularly section 15 of the act, which provided that one-half of the amount awarded as damages for lands taken "shall be charged upon the lands benefited by the laying out and opening" of the highway or reservation and that an assessment should be made "against each parcel which it shall find to be so benefited its proper proportionate part of the whole of said one-half of the damages." In an elaborate opinion delivered by Mr. Justice Gray the court held the act was capable of enforcement and that it contained no provision "inconsistent with the Constitution."

(All of the judges concurred in this opinion.)

It will be noticed that no taxing district was established by the act of Congress in question, but the assessments were to be "charged upon the lands benefited by the laying out and opening" of the proposed public improvements.

In Parsons *vs.* The District of Columbia, 170 U. S., 45,

the question was as to the validity of an act of Congress which provided for establishing in the District a comprehensive system regulating the supply of water and the erection and maintenance of reservoirs and waters mains. The legislation was upheld.

These cases may be arranged under three heads:

First. Those that concern the drainage and reclamation of swamp lands;

Second. Those that concern the repair and improvement of streets and the installation of sewers, sidewalks, curbs, and water mains;

Third. Those that have to do with the acquisition of lands by proceedings in eminent domain.

The judgments of the courts under the first and second heads invoke the exercise of police powers in subserving the health and comfort of the community no less than the sovereign right of taxation. In the street repair and improvement cases the decisions were rested partly on the theory that the work was part of the "system" prescribed for the community at large. Besides, as was said in Mr. Brandenberg's case, "the legislature would be warranted in assuming that grading and paving streets in a good-sized city commonly would benefit adjoining land more than it would cost. The chances of the cost being greater than the benefit is slight, and the excess, if any, would be small. This and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation" (205 U. S., 139).

In *Bauman vs. Ross* one of the questions was as to the power of Congress to levy special assessments imposing upon the lands benefited the amount awarded by the court as damages for each highway or reservation condemned or established under the act, but the assessment was to be charged only upon lands actually benefited, and, of course, only to the extent of benefits actually conferred. The act did not require that one-half of the damages awarded be apportioned arbitrarily among the owners of land within a limited radius irrespective of the benefits to such lands.

But in Spencer *vs.* Merchant the court lays down the broad proposition (though it seems to have been *obiter*)

that the legislature may, in the exercise of the power of taxation, direct that the whole or part of the expense of a public improvement be assessed upon the owners of land benefited thereby, and determine the territorial district in which the assessment shall be placed. In this case no question arose as to the excess of the cost of the improvement there in question over the special benefits.

And Mr. Justice Harlan says in his dissenting opinion in French *vs.* Barber Asphalt Paving Co. (181 U. S., 361) that he agreed with the conclusion of the court in Spencer *vs.* Merchant "because no question arose as to an excess of cost of the improvement there in question over special benefits."

In the same dissenting opinion he says of Parsons *vs.* The District of Columbia (170 U. S., 361): "But the court took care to add 'and there is no such disproportion between the amount assessed and the actual cost as to show any abuse of legislative power.' The words thus added are significant and if they had not been added the opinion would not have passed without dissent. The words referred to justify the conclusion that if there had been an abuse of legislative power; that if the amount assessed had been substantially or materially in excess of the cost of the work, or of the value of the property assessed, or of the special benefits received, the owners of the abutting property might justly have complained of a violation of their constitutional rights."

The question before the court was as to the constitutionality of a statute validating what had been judicially determined to be a void assessment. The report does not show that there was any complaint by the land-owner that his property was not benefited to the full amount of the assessment and more, or, in other words, that he was not getting *just compensation* for what was taken from him for public use.

In the course of his opinion Mr. Justice Gray, in Spencer *vs.* Merchant, says (p. 357):

> "In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

This ~~being~~ *begins* a new chapter in the discussion of the constitutional meaning and value of the phrase, "due process of law," concerning which the late Justice Miller in 1877 (Davidson *vs.* New Orleans, 96 U. S., 101) said:

> "It remains today without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States."

And it would seem that the words, "due process of law," at this late day remain "without that satisfactory precision of definition" referred to by Mr. Justice Miller, for in a late case the court say, speaking by Mr. Justice Moody:

> "Few phrases of the law are so elusive of exact apprehension as this. Doubtless the difficulties of ascertaining its connotation have been increased in American jurisprudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power" (Twining *vs.* New Jersey, 211 U. S., 78, 99, 100).

But however much the courts may differ as to the constitutional meaning and value of the phrase "due process of law," all agree that "it means that there can be no proceeding against life, liberty or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for

the security of our private rights" (per Field, J., in *Hagar vs. Reclamation District*). And it is a rule founded upon the first principles of natural justice older than written constitutions that the citizen shall not be deprived of life, liberty or property without an opportunity to be heard in defense of his rights.

But in this case the burden was imposed by Congress, presumably after availing "itself of such information as it deemed sufficient either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction," without notice of any sort to appellee or giving him an opportunity to be heard in defense of his rights. From such legislation, it is contended, there can be no appeal to the courts as in all other cases of the taking of private property for public use. This seems to be tantamount to saying that though property itself may not be taken for public use without just compensation, deprivation may be accomplished by indirection—by arbitrarily imposing an assessment or lien under which the property may be sold.

And here the appellants' contention is that although the District authorities may not take for uses of a public street the lands of A without compensation, they may make A's neighbors, B, C, and D, pay the price of the land, though they get nothing in return.

As was determined by the award of the jury of seven, the burden imposed in this case, being one-half of the purchase price of the lots needed for the proposed widening and extension of Sherman avenue, was $77,293.50, and the appellee and other owners of lands lying within three hundred feet east and west of Sherman avenue are called upon to pay this large sum into the public treasury. When they ask why they should pay it, the authorities answer because Congress so decreed in the act of March 3, 1899. If they

should ask further "what do we get in return" the answer can only be "you get nothing." Thus constitutional guarantees are suspended and the word of the legislature becomes supreme. If this be the law to-day it cannot now be said, as was said by Justice Patterson in 1795:

> "The Constitution expressly declares that the right of acquiring, possessing and protecting property is natural, inherent and inalienable; it is not *ex gratia* from the legislature, but *ex debito* from the Constitution" (Van Horn's Lessee *vs.* Dorrance, 2 Dallas, 304, 311).

It is a principle that underlies all forms of government by law that a citizen shall not be deprived of life, liberty or property without "due process of law." The legislature has no power to take away a man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him and for a full opportunity of time, place and tribunal to be heard in defense of his rights. This constitutional guaranty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty or property, whether the proceeding be judicial, administrative or executive. The only hearing accorded to the appellee from the beginning to the end of the scheme for widening and extending Sherman avenue—from the time the bill authorizing the extension was introduced in the House of Representatives until his land was advertised for sale for non-payment of the assessment—is the very scanty right to be heard upon the question of the proportion he should pay of a gross arbitrary assessment. That is accorded to him apparently as an idle form, for even in respect to that limited point, if he cannot be heard on the question of benefit received, the hearing is practically nugatory.

In this case the legislature after presumably availing itself, without notice to appellee, "of such information as it deemed sufficient," and having arbitrarily decreed that the land

owners should pay into the District treasury a very large sum of money, to wit, $77,293.50, invites them to come before the jury of seven and scramble amongst themselves, like Kilkenny cats, over the ratio of apportionment. With the result of this controversy the District has no concern, for the jury must assess at least one-half of the amount awarded against the several pieces or parcels of land within the designated district, without a suggestion that in making the apportionment they take into consideration any question of benefit. The tax officials do not care who pays the $77,293.50, or in what proportions it is paid, provided the same finally finds its way into the District treasury as part of the cost of widening and extending Sherman avenue.

Norwood *vs.* Baker, 172 U. S., 269:

That case arose out of the condemnation of certain lands for the purpose of opening a street in the village of Norwood, a municipal corporation in the State of Ohio. The principal question presented involved the validity of an ordinance of the village assessing upon Mrs. Baker's lands abutting on each side of the new street an amount covering not simply a sum equal to that paid for the land taken for the street, but, in addition, the cost and expenses of the condemnation proceedings. The strip condemned belonged entirely to Mrs. Baker and it was estimated by the jury as being worth $2,000, which was paid to the owner. It was adjudged by the court that the village have immediate possession and ownership of the strip for the new street.

Shortly after the finding of the jury was returned, the village council passed an ordinance levying an assessment on lands of Mrs. Baker on both sides of the new street for an amount equal to the cost of the land and the expense of the condemnation proceedings, amounting in all to $2,218.58. There was no pretense that this sum bore any relation whatever to the benefits accruing to the land owner from the opening of the new street.

As in the case now under consideration, the land owner brought suit to obtain a decree restraining the village from enforcing the assessment in question against her property on the ground that the assessment complained of was in violation of the Fourteenth Amendment of the Constitution forbidding any State from depriving a person of property without due process of law. By decree of the circuit court the village was perpetually enjoined from enforcing the assessment. From this decree the village appealed to the Supreme Court where the decree was affirmed, one Justice dissenting. The opinion of the court, delivered by Mr. Justice Harlan, thoroughly discusses the principles of law applicable to this case and exhaustively considers the decisions of the Supreme Court and the State courts bearing on the question. In the course of his opinion he reaches the following conclusion:

> "Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property—such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements."
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> * * * * * * *
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> "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the

owner from such could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received.

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

The next case wherein the legal import of the phrase "due process of law" as affecting the right to impose special assessments received the consideration of the Supreme Court in

French *vs.* Barber Asphalt Paving Co., 181 U. S., 324.

This was a suit instituted by the paving company to enforce a lien of certain special tax bills against the property of Margaret French and others, issued by the city of Kansas City in part payment of the cost of paving a street on which the property abutted. Under the city charter the lien of the tax bills was enforceable by a suit against the owners of the land. On the part of the property owners it was contended

that the cost of the paving was charged against their lands "according to the frontage without reference to any benefits to the property on which the charge was made and the special tax bills levied." The report does not show whether or not the property owners contended that the charge substantially exceeded the benefits conferred by the public improvement. The controversy arose entirely over the *cost of paving* and did not *involve the purchase of land* for a needed public improvement. In other words, it was a case where the "legislature (or the common council of Kansas City) would be warranted in assuming that grading and paving streets in a good-sized city commonly would benefit adjoining land more than it would cost" (per Holmes, J., in Mr. Brandenberg's case, 205 U. S., 139).

Commenting on *Norwood vs. Baker,* the court say, Mr. Justice Shiras delivering the opinion:

> "That was a case where by a village ordinance, apparently aimed at a single person, a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the costs and expenses of the condemnation proceedings, was thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and to a majority of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power. This court, however, did not affirm the decree of the trial court awarding a perpetual injunction against the making and collection of any special assessments upon Mrs. Baker's property, but said:
>
> "It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might

> thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of the opening of the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the State."

This is the proposition now contended for—that the amount assessed should equal and not exceed, the benefit actually conferred. But the conclusion reached in terms condemns an assessment levied without "due and proper inquiry" as to the "special benefits accruing to the property."

It will be noticed that the distinguished jurist calls attention to the fact that it was a "case whereby a village ordinance apparently aimed at a single person a portion of whose property was condemned," &c., &c. But suppose the abutting property upon which the act of confiscation was imposed had belonged to two or more owners. What difference in principle could that have made, especially as the Constitution says that no person shall be so despoiled? It would be but poor consolation to a man whose property was being taken away from him, and nothing given in return, to say that his next-door neighbor was being treated in exactly the same way.

"The due and proper inquiry" as used in the opinion would seem to require an inquiry into the question of benefits before some tribunal where a property owner might appear in defense of his rights and not rest upon the will of the legislature availing "itself of such information as it deemed sufficient, either through investigations of its committees or by adopting as its own estimates or conclusions of others, whether those estimates or conclusions had or had not any legal sanction," all without notice to the person whose property is to be taken for public use. A taking of private property for public use by a special assessment as for

benefits conferred by a special improvement is not a legislative but a judicial question upon which the parties in interest are entitled to be heard and have their day in court.

Mr. Justice Harlan (with whom concurred Mr. Justice White and Mr. Justice McKenna) delivered a vigorous dissenting opinion and for the following reason (p. 353): "But I am quite sure, from the intimations contained in the opinion, that it will be cited by some as resting upon the broad ground that a legislative determination as to the extent to which land abutting on a public street may be specially assessed for the cost of paving such street is conclusive upon the owner, and that he will not be heard, in a judicial tribunal or elsewhere, to complain even if, under the rule prescribed, the cost is in substantial excess of any special benefits accruing to his property, or even if such cost equals or exceeds the value of the property specially taxed. The reasons which, in my judgment, condemn such a doctrine as inconsistent with the Constitution are set forth in Norwood *v.* Baker, and need not be reported."

At the same term, and on the same day, the case of Wight *vs.* Davidson, 181 U. S., 371, was decided.

This was an appeal from this court. The case arose under the act of Congress, also approved on the 3d day of March, 1899, authorizing the extension of S street and other streets, and more particularly over the clause of that act making provision for the award of damages and the assessment of benefits. This clause is as follows:

> "*And provided further,* That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets not less than one-half thereof shall be assessed by the jury in said proceeding against the pieces or parcels of land situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided."

It will be noticed that there is a very material difference between the language in this act and the language of the act for the extension of Sherman avenue, now under consideration. Under the S Street act one-half the amount awarded as damages was to be assessed upon the lands lying on each side of the street, "and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided." In the Sherman Avenue act the full one-half of the damages awarded is directed to be assessed on lands within a narrow radius whether actually benefited or not.

The court held that the law did not violate constitutional guaranties against taking private property for public use without just compensation. But the opinion of the court refers to and approves its previous ruling in Norwood *vs.* Baker in the following language (p. 384):

> "There the question was as to the validity of a village ordinance, which imposed the entire cost and expenses of opening a street, irrespective of the question whether the property was benefited by the opening of the street. The legislature of the State had not defined or designated the abutting property as benefited by the improvement, nor had the village authorities made any inquiry into the question of benefits. There having been no legislative determination as to what lands were benefited, no inquiry instituted by the village councils, and no opportunity afforded to the abutting owner to be heard on that subject, this court held that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking under the guise of taxation, of private property for public use without compensation."

Mr. Justice Harlan (with whom concurred Justices McKenna and White) dissented, and at the conclusion of his dissenting opinion he says:

"If Congress can, by direct enactment, put a special assessment upon private property to meet the entire cost of a public improvement made for the benefit and convenience of the entire community, even if the amount so assessed be in substantial excess of special benefits, and therefore, to the extent of such excess, confiscate private property for public use without compensation, it should be declared in terms so clear and definite as to leave no room for doubt as to what is intended."

Cooley and Dillon agree with our corollary.

"There can be no justification for any proceeding which charges the land with an assessment greater than the benefit; it is a plain case of appropriating private property to public use without compensation."
Cooley on Taxation, 3d ed., 1255.

"It is clear that any assessment is wrong which charges lands with a sum beyond the benefits received. If the cost of any improvement exceeds the local and peculiar benefit, the improvement should either not be made at all or the excess should be assessed on the public and become part of the general levy."
Id., 1260.

"As has been well said, to compel individuals to contribute money or property to the use of the public without reference to any common ratio and without requiring the sum paid by one piece or kind of property or by one person to bear any relation whatever to that paid by another, is to lay a forced contribution not a tax within the sense of those terms as applied to the exercise of powers by any enlightened and responsible government."
Id., 1224.

"The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being in-

creased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies."

Id., 1154.

"But since the period when express provisions have been made in many of the State constitutions requiring *uniformity and equality of taxation,* several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that special *benefits actually received* by each parcel of contributing property, was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must upon principle be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury."

2 Dillon Mun. Corp., 4th edition, 936.

Bradenburg *vs.* The District of Columbia, 205 U. S., 135,

is the latest decision of the Supreme Court on what is styled in the opinion of the court "the difficult question with which we have been concerned."

The question discussed in Mr. Bradenburg's case arose over an assessment for widening an alley under recent acts of Congress. The constitutionality of the acts was assailed because the jury was authorized "to appraise the damages to real estate" and also to "apportion an amount equal to the amount of said damages so ascertained and appraised as aforesaid, 'including fixed pay for marshal and jury, according as each lot or part of lot of land in such square may be benefited by the opening, widening, extending and straightening such alley' with certain deductions."

The court says, Mr. Justice Holmes delivering the opinion:

> "The law is not a legislative adjudication concerning a particular place and a particular plan like the one before the court in Wight *vs.* Davidson, 181 U. S., 371. It is a general prospective law. The charges in all cases are to be apportioned within the limited taxing district of a square, and therefore it well may happen, it is argued, that they exceed the benefit conferred, in some case of which Congress never thought and upon which it could not have passed. The present is said to be a flagrant instance of that sort. If this be true, perhaps the objection to the act would not be disposed of by the decision in Louisville & Nashville R. R. Co. *vs.* Barber Asphalt Paving Co., 197 U. S., 430. That case dealt with the same objection, to be sure, in point of form, but a very different one in point of substance. The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the Fourteenth Amendment, a system of delusive exactness and merely logical form.
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> "But when the chance of the cost exceeding the benefit grows large and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain. So it might well be that a form of assessment

that would be valid for paving would not be valid for the more serious expenses involved in the taking of land. Such a distinction was relied on in French *vs.* Barber Asphalt Paving Co., 181 U. S., 324, 344, to reconcile the decision in that case with Norwood *vs.* Baker, 172 U. S., 269.

"And yet it is evident that the act of Congress under consideration is very like earlier acts that have been sustained. That passed upon in Wight *vs.* Davidson, it is true, dealt with a special tract, and so required the hypothesis of a legislative determination as to the amount of benefit conferred. But the real ground of the decision is shown by the citation (181 U. S., 378, 379), of Bauman *vs.* Ross, 167 U. S., 548, when the same principle was sustained in a general law (167 U. S., 589, 590). It is true again that in Bauman *vs.* Ross, the land benefited was to be ascertained by the jury instead of being limited by the statute to a square; but it was none the less possible that the sum charged might exceed the gain. As only one-half the cost was charged in that case it may be that on the practical distinction to which we have adverted in connection with Louisville & Nashville R. R. Co. *vs.* Barber Asphalt Paving Co., the danger of such an excess was so little that it might be neglected, but the decision was not put on that ground.

"In view of the decision to which we have referred it would be unfortunate if the present act should be declared unconstitutional after it has stood so long. We think that without a violent construction of the statute it may be read in such a way as not to raise the difficult question with which we have been concerned. It is true that the jury is to apportion an amount equal to the amount of the damage ascertained, but it is to apportion it 'according as each lot or part of lot of land in such square may be benefited by the opening, etc.' Very likely it was thought that in general, having regard to the shortness of the alleys, the benefits would be greater than the cost. But the words quoted permit, if they do not require, the interpretation that in any event the apportionment is to be limited to the benefit, and if it is so limited all serious doubt as to the validity of the statute disappears."

This decision is put distinctly on the ground that there was nothing in the record to show that the jury limited the assessment to the benefit actually conferred, thus adhering to the principle announced in Norwood *vs.* Baker. With such a safeguard we get back to the sounder doctrine of the fathers—that "the right of acquiring, possessing and protecting property * * * is not *ex gratia* from the legislature, but *ex debito* from the Constitution."

Our contention is not at variance with the conclusion of the court in Buchanan *vs.* Macfarland, 31 App. D. C., 18, and in Briscoe *vs.* Macfarland, 32 App. D. C., 170.

In the former case, page 18, the court say:

> "There is no doubt of the power of Congress to authorize the extension of streets, and the assessment of adjacent lands to *the extent* of the benefits thereby received in the designated taxing district."

In the Briscoe case (page 170) the court say:

> "There is nothing in the record to indicate that the amount assessed against complainant's lot was actually in excess of the benefits accruing from the extension of the avenue so as to bring the same within the principle governing the case of Martin *vs.* District of Columbia, 205 U. S., 135, 140."

A like conclusion was announced by this court in a later case, Henderson *vs.* Macfarland, Law Reporter, vol. 37, page 290.

In the case now under consideration there is a distinct averment that the amounts assessed against the appellee's lots "is greatly in excess of any benefit accruing to said lots by reason of said widening and extension of said Sherman avenue" (R., pp. 3 & 4).

Not only this, but the Congress of the United States has come round to the view that the Constitution is the standard by which property rights in this country are to be measured, rather than that the legislature do the measuring by "adopting as its own estimates and conclusions of others, whether those estimates and conclusions had or had not any legal sanction."

By an act approved April 30, 1906, an amendment to the Code was made whereby a uniform system was adopted for the condemnation of land for streets in the District of Columbia. This act, as incorporated in the Code, section 419*g*, provides that of the amount found due and awarded as damages, plus the cost and expenses of land needed for the street, "such amount shall be assessed by the jury as benefits and to the extent of such benefits" against the lots on each side of the street and all other lots which the jury may find will be benefited by the improvement.

And under the act of June 29, 1906, provision is made for assessing actual benefits accruing to adjacent lands from the widening and extension of Sherman avenue, and to exact from nearby lands only an equivalent for benefits bestowed. Why not treat all alike? Why require of some of the property owners only that they pay for actual benefits and of others that they pay an arbitrary sum for which they receive nothing in return?

The right to levy local assessments is generally conceded to be an exercise of the sovereign right of taxation, and in this exercise equality and uniformity are essential elements; otherwise, as here admitted, one tax payer is required to pay more than his just proportion towards the support of the government. As was said by Mr. Choate in his concluding argument in the great case of Pollock *vs.* Farmers Loan & Trust Company, 157 U. S., 549:

> "This is a doctrine worthy of a Jacobin club that proposed to govern France; it is worthy of a Czar of

> Russia proposing to reign with undisputed and absolute power; but it cannot be done under this Constitution."

In upholding Mr. Choate's contention in that case, Mr. Justice Field says, in his concurring opinion, at page 599:

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax."

The appellee seeks in these proceedings the protection of constitutional guaranties, as thus interpreted and defined by the law-making power in the act of April 30, 1906, nothing more. The order of the court below being necessary to prevent a sale of his property for an illegal assessment, pending judicial ascertainment of his rights in the premises, we submit that it should be affirmed.

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In our brief, at the top of page 9, it is stated: "The act of March 3, 1899, directed that proceedings should be conducted under and in accordance with the provisions of sections 257-267 of the Revised Statutes of the District of Columbia." This is a slight error because the law says that the proceedings shall be conducted "under and according to the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia." Chapter 11 of the Revised Statutes entitled "Highways, Roads, and Bridges" embraces sections 247 to 270, inclusive, but sections 252 to 265, inclusive, only have reference to the projection or extension of streets. They are as follows:

"SEC. 252. Whenever application shall be made to the proper authorities, by residents of the District without the limits of Washington and Georgetown, to lay out a new or alter any existing road, and whenever such authorities shall deem it conducive to the public interests to open a new road, or widen or change the course of an old one, the route of such road shall be surveyed, and a plat or map of the same prepared.

"SEC. 253. The proper authorities shall cause notice to be given, by advertisement twice a week for three weeks, of the proposed opening of the new road, or of the alteration of an existing one, calling upon all persons who may have any objections thereto to present them to such authorities at their next regular meeting, when, if any objections are made, such objections shall be heard.

"SEC. 254. If the route only is objected to, and another suggested as more advantageous, such route may be adopted, or five discreet, disinterested men, of whom the surveyor shall be one, may be appointed to examine all the proposed routes and report such one as they shall deem most feasible and advantageous to the District, and such report shall be made to the authorities at their next meeting.

"SEC. 255. If no objection to opening or altering a road is made by the owners of the land through which it must

pass, after such notice, it shall be taken for granted that no damages are or will be claimed, and the road may be recorded and opened, and shall then be a public road or highway.

"SEC. 256. The notice required to be given by section two hundred and fifty-three need not be given when all the parties interested are agreed, and all roads laid out under such agreement without notice being given are lawful highways.

"SEC. 257. If any owner of land shall object and claim damages, and the amount cannot be agreed upon, the proper authorities shall direct the marshal of the District to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof.

"SEC. 258. It shall be the duty of the marshal, upon receiving the order mentioned in the preceding section, to give the owners not less than ten days' notice of the time and place of the meeting of the jury to assess their damages.

"SEC. 259. In cases where the notice cannot be served on the owner and in all cases where the land through which it is proposed to run a road shall belong to a minor or minors, it is presumed that objection is made, and damages shall be assessed accordingly.

"SEC. 260. The marshal shall summon the jury, and administer an oath or affirmation to them that they will, without favor or partiality to any one, to the best of their judgment, decide what damage, if any, each owner may sustain by reason of running the road through his premises.

"SEC. 261. In making their decision the jury shall take into consideration the benefit such road may be to each owner by enhancing the value of his land, or otherwise, and shall give their verdict accordingly.

"SEC. 262. The jury, having been upon the premises and assessed the damages, shall make out a written verdict, to be signed by them, or a majority of them, and attested by the marshal, which the marshal shall transmit to the proper

authorities at their next meeting, and which shall be recorded.

"SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury.

"SEC. 264. The verdict of the second jury, signed by each of the jurors, or a majority of them, shall be returned to the proper authorities at their next meeting and recorded as final and conclusive, and the road shall then be declared a public road, and opened as such.

"SEC. 265. In all cases where it becomes necessary to summon a second jury to assess damages, if the amount assessed by the second jury shall not be greater than the amount assessed by the first, the costs of the second jury shall be paid by the parties objecting to the first verdict; but if greater, they shall be paid by the District. All expenses up to the second jury shall be paid by the District."

Court of Appeals, District of Columbia.

OCTOBER TERM, 1909.

No. 2010.

HENRY B. F. MACFARLAND AND OTHERS,
APPELLANTS,

vs.

CHRISTIAN F. UMHAU.

MOTION FOR REARGUMENT OF THE CONSTITUTIONAL QUESTIONS INVOLVED IN THE CASE.

Now comes the appellee by his attorneys and moves the court for a reargument of his contention that the act of Congress of March 3, 1899, is unconstitutional for that the assessment levied and complained of is grossly in excess of benefits received.

In support of this motion the following reasons are assigned:

First. The bill alleges that the assessment levied is greatly in excess of benefits received and in excess of any that possibly can hereafter accrue to appellee's lots from the completed street.

Second. In Norwood *v.* Baker, 172 U. S., 269, the court said, *"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the benefits accruing to him is to the extent of said excess a taking under the guise of taxation of private property for public use without compensation."*

Third. This principle was in terms affirmed in French *v.* Barber Asphalt Paving Co., 181 U. S., 324.

Fourth. It was also affirmed in Wight *v.* Davidson, 181 U. S., 371, in the following language: "There having been no legislative determination as to what lands were benefited, no inquiry instituted by the village council, and no opportunity afforded to the abutting owner to be heard on that subject, this court held that *the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is to the extent of such excess the taking under the guise of taxation of private property for public use without compensation."*

The act of Congress under consideration in Wight *v.* Davidson provided that one-half of the amount awarded as damages should be assessed on lands lying on each side of the extension of the street and on all adjacent parcels of land which would be benefited thereby. In the act of March 3, 1899, in so far as it refers to Sherman avenue nothing is said about benefits. It arbitrarily directs that one-half the amount awarded as damages shall be assessed against a little strip of land lying within three hundred feet of the avenue and whether benefited or not, and the instruction of the court (addition to record, p. 2) directed the jury to so apportion one-half of the amount awarded as damages. Nothing whatever was said about benefits. Wherefore the mention of benefits in the verdict returned by the jury was

entirely without their province, for under the instructions of the court that subject was not submitted to them, and the reference to benefits in the jury's return was manifestly suggested by the corporation counsel as a necessity of the case.

As was said by the court in Wight *v.* Davidson, "There has been no legislative determination as to what lands were benefited, no inquiry instituted by the village council, and no opportunity afforded to the abutting owner to be heard on that subject."

In this connection the bill charged, paragraph 9 (R., p. 4), that "The said jury of seven, in and by their verdict, did not undertake to assess benefits upon the land abutting on both sides of said avenue and the extension thereof to a depth of three hundred feet, to the extent that said land might be benefited by the proposed widening and extension of Sherman avenue, but only apportioned among said lots within the proscribed area one-half of the amount found due and awarded for damages for and in respect of the lands condemned."

In other words, the jury's verdict reflected the instructions of the court and it did nothing more, for there was no inquiry and could have been none, under the law, as to benefits.

Fifth. In the case of Brandenburg *v.* The District of Columbia, 205 U. S., 135, the court again affirmed the principle announced in Norwood *v.* Baker in a lengthy opinion by Mr. Justice Holmes. After quoting from the alley act providing that the amount awarded as damages should be apportioned according as each lot might be benefited, he says, "Very likely it was thought that, in general, having regard to the shortness of the alleys, the benefit would be greater than the cost. But the words quoted permit if they do not require the interpretation that in any event the *apportionment is to be limited to the benefit,* and if it is so limited all serious doubts as to the validity of the statute disappear."

This can only mean that if the assessment is not limited to the benefit, doubts as to the validity not only will disappear, but the unconstitutionality of the act will at once be uncovered.

Sixth. Under the act of June 29, 1906, already in motion as to some of the lots abutting on Sherman avenue, it is possible to have a fair assessment of actual benefits, so that all property-owners similarly situated may be assessed alike as for benefits arising from the extension and widening of Sherman avenue. If the proceeding is conducted under this statute, the District can lose nothing that it ought properly to get, while the property-owners will not be required to pay more than their just dues, and nothing in excess of benefits actually received, and all will fare exactly alike. And no delay can occur in a new proceeding for the assessment of benefits, for remedial legislation was procured on the 29th day of June, 1906, which, as before shown, is now being applied to some of the lands benefited by the extension. Why not treat all alike, now that the amplest opportunities are offered? The property-owners affected owe to the District of Columbia because of their duty as citizens, what the benefit of their lands is worth in money, and not one cent more. If through inadvertence or because badly advised by counsel, who misunderstood the rulings of this court as to the effect of exceptions to the verdict of a jury of seven, they still ought not to be subjected to what is the equivalent of a fine or penalty for some misdemeanor. They have not been guilty of wrong-doing in any sense, and ought to receive the same treatment that is accorded to other property-owners who employed counsel at the outset of these proceedings to resist any and all assessment.

All that appellee asks is that there may be an assessment of benefits, and to do this the Commissioners have the requisite authority of law.

Seventh. In the presentation of the case the time of counsel was taken up discussing the irregularities in the condemnation proceedings. These were complicated and numerous and their proper consideration left no time to discuss the more serious constitutional question involved. This is one of many cases, involving in the aggregate many thousands of dollars, and is worthy of full discussion and the fullest consideration.

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